

No. 12089

United States
Court of Appeals
for the Ninth Circuit

JAMES E. EVERETT,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

JAN 14 1949

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HILDEBRAND, BILLS & McLEOD,
1212 Broadway,
Oakland, California,
Attorneys for Plaintiff and Appellant.

JOHNSON, RICKSON & JOHNSON, &
FREEMAN,
1003 Central Bank Building,
Oakland, California,
Attorneys for Defendant and Appellee.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 27709-G

JAMES E. EVERETT,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Defendant.

COMPLAINT FOR DAMAGES
(Personal Injuries)

Plaintiff complains of defendant and for cause of
action alleges:

I.

That at all times herein mentioned defendant was
and now is a corporation organized and existing
under and by virtue of the laws of the State of
Delaware and doing business in the State of Cali-
fornia, and other states and that said defendant
was at all times herein mentioned and now is en-
gaged in the business of a common carrier by rail-
road in interstate commerce, in said state of Cali-
fornia and other states.

II.

That at all times herein mentioned defendant was
a common carrier by railroad engaged in interstate
commerce and plaintiff was employed by defendant
in such interstate commerce, and [1*] the injuries

* Page numbering appearing at foot of page of original certified
Transcript of Record.

hereinafter complained of arose in the course of and while plaintiff and defendant were engaged in the conduct of such interstate commerce.

III.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq. and the Federal Boiler Inspection Act, 45 U.S.C.A. 23, et seq.

IV.

That on or about the 14th day of July, 1947, at or about 10:35 o'clock a.m. thereof, plaintiff was employed by defendant as a fireman working on one of defendant's locomotive engines No. 1823 which was standing on defendant's track No. 4 in defendant's railroad yard at Santa Barbara, California.

V.

That at said time and place acting in the regular course and scope of his duties plaintiff was working on the front end of said engine engaged in putting up the indicators; that at said time and place the said engine and all its parts and appurtenances were defective and inefficient and unsafe to operate in the regular service to which they were put in that one of the handrails near the front of said engine was insecure and broken; that as a direct and proximate result of said inefficient and defective condition and while using the said handrail in the regular manner, plaintiff was caused to fall from said engine to the ground and suffer the injuries hereinafter enumerated.

VI.

That at said time and place the said engine and all its parts and appurtenances were in an improper, unsafe and defective condition in violation of Sec. 23 of the Boiler Inspection Act, Title 45 on railroads, United States Code Annotated. [2]

VII.

That by reason of the facts hereinabove set forth, and as a direct and proximate result thereof, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to wit: severe injury in the region of the back, extreme pain and suffering, and a severe shock to his nervous system.

VIII.

That at the time of the happening of the accident, plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately \$300.00 per month; that by reason of the facts hereinabove alleged and the injuries proximately caused plaintiff thereby, plaintiff is now and will be for an indefinite period of time in the future rendered incapable of performing his usual work or services or any work or services whatsoever, all to plaintiff's damage in an amount as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of court to insert said sum as the reasonable value of said loss of services.

IX.

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof as aforesaid, plaintiff has been generally damaged in the sum of \$75,000.00.

Wherefore, plaintiff prays judgment against defendant in the sum of \$75,000.00 together with his special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

HILDEBRAND, BILLS & McLEOD,
By C. C. McLEOD,
Attorneys for Plaintiff. [3]

[Duly Verified.]

[Endorsed]: Filed Oct. 22, 1947. [4]

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above named Defendant: Southern Pacific Company, a corporation,

You are hereby summoned and required to serve upon Hildebrand, Bills & McLeod, plaintiff's attorneys, whose address is 1212 Broadway, Oakland, California, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by

default will be taken against you for the relief demanded in the complaint.

[Seal]

C. W. CALBREATH,

Clerk of Court.

By JOHN E. SCHAEFFER,

Deputy Clerk.

Date: Oct. 22, 1947.

Received Oct. 22, 1947, U.S. Marshal's Office, San Francisco, Calif. [5]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 24th day of October, 1947, I received the within summons and complaint and served the same on Southern Pacific Co. by serving Roy G. Hillebrand as Statutory agent at San Francisco, California, on the 24th day of October, 1947.

GEORGE VICE,

United States Marshal.

By HERBERT R. COLE,

Deputy United States Marshal.

Marshal's Fees: Service \$2.00.

[Endorsed]: Filed Oct. 27, 1947. [6]

[Title of District Court and Cause.]

ANSWER

Comes now defendant Southern Pacific Company, a corporation, and answering the complaint of

plaintiff on file herein, admits, denies, alleges and avers as follows, to wit:

I.

Answering Paragraphs I, III and IV, defendant admits the allegations therein contained.

II.

Answering that portion of Paragraph II commencing with the word "and" on Page 1, Line 32, and ending with the word "commerce" on Page 2, Line 3, defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

III.

Answering that portion of Paragraph V commencing with the [7] word "that" on Page 2, Line 18, and ending with the word "enumerated" on Page 2, Line 26, defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

IV.

Answering Paragraphs VI, VII and IX, defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

Further answering said Paragraph IX, defendant specifically denies that plaintiff has been damaged in the sum of Seventy-Five 'Thousand (\$75.-000.00) Dollars, or in any other sum or sums whatsoever, or at all.

V.

Answering Paragraph VIII, defendant alleges that it does not have sufficient information or belief on the subject to enable it to answer the, or any of the, allegations therein contained, and basing its denial on that ground, denies each and every, all and singular, generally and specifically, the allegations therein contained, and each and every part thereof.

Wherefore, defendant prays that plaintiff take nothing by his complaint on file herein, and that it have judgment for its costs of suit incurred herein.

JOHNSON, RICKSEN & JOHNSON

By STANLEY JOHNSON,
Attorneys for Defendant.

[Acknowledgment of Service attached.]

[Endorsed]: Filed Nov. 29, 1947. [8]

[Title of District Court and Cause.]

DEMAND FOR TRIAL BY JURY

To the Defendant above named and to Johnson,
Ricksen & Johnson, its attorneys:

You and each of you are hereby notified that plaintiff above named hereby demands a trial by jury in the above entitled cause in accordance with

Rule 38-B of the rules of Civil Procedure of the above entitled Court.

Dated this 1st day of December, 1947.

HILDEBRAND. BILLS & McLEOD,
Attorneys for Plaintiff.

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed Dec. 2, 1947. [10]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 22nd day of December, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

ORDER SETTING CASE FOR TRIAL

This case came on regularly this day to be set for trial. On motion of Richard Crowe, Esq., attorney for plaintiff, it is Ordered that trial be set for April 6, 1948 (Jury). [11]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of Cali-

fornia, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 6th day of April, in the year of our Lord one thousand nine hundred and forty-eight.

Present: the Honorable Dal M. Lemmon, District Judge, sitting for the Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

TRIAL

This case came on regularly this day of trial. D. W. Brobst, Esq., was present for the plaintiff, and James R. Freeman, Esq., was present on behalf of the defendant. Thereupon the following persons, viz: H. Elmer Rateliff, Edward A. Nolan, Maurice C. Ulmer, David N. Cordis, Viola J. Ditzen, Clotilde F. Doll, Lloyd Sutherland, Frank Cuda, Phoebe M. Lawson, Virginia L. Bryant, Alicia E. Hinds, and John E. Green, twelve good and lawful jurors, after being duly examined under oath, were accepted and sworn to try the issues joined herein. After hearing Mr. Brobst and Mr. Freeman, its is Ordered that this case be continued to April 7, 1948, at 10:00 a.m., and the jury, after being duly admonished, was excused until that time. [12]

District Court of the United States. Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room

thereof, in the City and County of San Francisco, on Wednesday, the 7th day of April, in the year of our Lord one thousand nine hundred and forty-eight.

Present: the Honorable Dal M. Lemmon, District Judge, sitting for the Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

TRIAL

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was resumed. Thereupon the case proceeded to trial. Mr. Brobst made a statement to the Court and jury on behalf of the plaintiff. James E. Everett and F. J. Carlson were sworn and testified for the plaintiff. Mr. Brobst introduced in evidence and filed Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, and 7. William F. Holcomb was sworn and testified on behalf of the defendant. Mr. Freeman introduced in evidence and filed Defendant's Exhibits A, B, C, D, E, and F. Ordered that the further trial hereof be continued until April 8, 1948, and the jury, after being duly admonished, was excused until that time. [13]

District Court of the United States. Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco,

on Thursday, the 8th day of April, in the year of our Lord one thousand nine hundred and forty-eight.

Present: the Honorable Dal M. Lemmon, District Judge, sitting for the Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

TRIAL—VERDICT—ORDER FOR
JUDGMENT

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was resumed. Mr. Brobst read into evidence certain medical reports, and the plaintiff rested. Sidney S. Winkler and Charles S. Stevens were sworn and testified for the defendant. Mr. Freeman introduced in evidence and filed Defendant's Exhibit G, and the defendant rested. James E. Everett was recalled in rebuttal and testified on behalf of the plaintiff. Mr. Brobst introduced in evidence and filed Plaintiff's Exhibit No. 8, and the plaintiff rested. Thereupon the evidence was closed. After argument by the attorneys and the instructions of the Court to the jury, the jury at 2:55 p.m. retired to deliberate upon their verdict. At 8:53 p.m. the jury returned into Court and upon being asked if they had agreed upon a verdict, replied in the negative. After further instructions by the Court to the jury, the jury at 9:00 p.m. again retired to deliberate upon their verdict. At 9:10 p.m. the jury returned into Court and upon being asked

if they had agreed upon a verdict, replied in the affirmative and returned the following verdict, which was Ordered recorded, viz: "We, the Jury, find in favor of the Defendant. Maurice C. Ulmer, Foreman," and the jury, upon being asked if said verdict as recorded is the verdict of the jury, each juror replied that it is. On motion of Mr. Brobst, the jury was polled. Ordered that the jury be excused from the further consideration hereof and until further notice. It is further Ordered that judgment be entered herein in accordance with the verdict. [14]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Defendant.

MAURICE C. ULMER,
Foreman.

[Endorsed]: Filed April 8, 1948. [15]

In the Southern Division of the United States District for the Northern District of California

No. 27709-G

JAMES E. EVERETT,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on the 6th day of April, 1948, being a day in the March 1948 Term of said Court, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; D. W. Brobst, Esq., appearing as attorney for plaintiff, and James R. Freeman, Esq., appearing as attorney for defendant, and the trial having been proceeded with on the 6th, 7th, and 8th days of April in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Defendant, Maurice C. Ulmer," and the Court having ordered that judgment be entered

herein in accordance with said verdict and for costs;

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action, and that defendant go hereof without day, and that said defendant do have and recover of and from plaintiff its costs herein expended taxed at \$.

Judgment filed this 9th day of April, 1948.

C. W. CALBREATH,
Clerk.

Entered in Civil Docket April 9, 1948.

[Endorsed]: Filed April 9, 1948. [16]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

To the Defendant above named and to Johnson, Rickson, Freeman & Johnson, its attorneys:

You, and each of you, are hereby notified that plaintiff herein files this motion for an order setting aside the verdict and judgment herein in favor of the defendant and granting to plaintiff a new trial. Said motion will be presented after due notice at a time and place to be set by the Court, before the Hon. Dal M. Lemmon, Judge of the United States District Court. Attached hereto and marked Exhibit "A" is a draft of the order which plaintiff proposes.

Said motion will be made on this Motion for New Trial, all of the records, papers and files herein, in-

cluding the minutes of the Court and all of the testimony taken herein. [17]

Said motion will be made severally on each of the grounds herein stated and as follows:

1. The evidence is insufficient to sustain the verdict;

2. The verdict is against the weight of the evidence;

3. The evidence is insufficient to sustain the verdict and the verdict is against the weight of the evidence;

- (a) That the evidence showed without contradiction that plaintiff was injured because the handrail on the engine broke and caused him to fall.

- (b) That the evidence showed without contradiction that the defendant was absolutely liable for the injuries sustained by plaintiff as his said injuries resulted proximately from a violation of the Federal Boiler Inspection Act, 45 U.S.C.A., *we, et seq.*

4. The jury was prejudiced by the introduction into the case of the possible excessive use of liquor by plaintiff;

- (a) That although the court instructed the jury to disregard the question of liquor, the matter had already come before the jury and an instruction could not erase that fact from the minds of the jury.

- (b) That defendant committed reversible error in injecting the element of liquor into the case.

Wherefore, it is moved and will be moved and is

prayed that the verdict and judgment be set aside and a new trial be granted to plaintiff herein.

HILDEBRAND, BILLS & McLEOD,
By D. W. BROBST,
Attorneys for Plaintiff.

[Endorsed]: Filed April 17, 1948. [18]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 7th day of July, in the year of our Lord one thousand nine hundred and forty-eight.

Present: the Honorable Dal M. Lemmon, District Judge.

[Title of Cause.]

ORDER DENYING MOTION FOR A
NEW TRIAL

The motion for a new trial in this case heretofore having been heard and submitted, being now fully considered, it is Ordered that the motion for a new trial be and the same is hereby denied. [19]

[Title of District Court and Cause.]

NOTICE

To Messrs. Hildebrand, Bills & McLeod, 1212 Broadway, Oakland 12, California. Johnson, Rickson, Freeman & Johnson, 1003 Central Bank Bldg., Oakland 12, California:

You are hereby notified that on July 7, 1948, order was made and entered denying the Motion for New Trial.

San Francisco, California, July 8th, 1948.

C. W. CALBREATH,
Clerk, U. S. District Court. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above named plaintiff, James E. Everett, hereby appeals to the United States Circuit Court of Appeals for the Ninth (9th) Circuit from the final judgment and the whole thereof entered in this Court on or about the 9th day of April, 1948.

Dated: July 13, 1948.

HILDEBRAND, BILLS & McLEOD,
By D. W. BROBST,
Attorneys for Plaintiff.

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed July 15, 1948. [21]

[Title of District Court and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED

Plaintiff requests the entire record to be printed.

STATEMENT OF POINTS UPON WHICH
PLAINTIFF INTENDS TO RELY UPON
APPEAL

I.

That the court committed prejudicial error in permitting questions to be asked plaintiff relative to his use of intoxicating liquor.

II.

That prejudicial error was committed by the trial Court in permitting questions to be asked about plaintiff's excessive use of alcohol under the promise by attorney for the defendant [22] that it would be connected up to plaintiff's injury.

III.

That prejudicial error was committed when defendant failed to connect the use of alcohol by the plaintiff with plaintiff's injury or the happening of the accident.

IV.

That the evidence is insufficient as a matter of law to support the verdict.

Dated this 20th day of July, 1948.

HILDEBRAND, BILLS & McLEOD,

By D. W. BROBST,

Attorneys for Plaintiff.

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed July 22, 1948. [23]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the Above Entitled Court:

You are hereby requested to make a transcript of records to be filed in the United States Circuit Court of Appeal for the Ninth Circuit pursuant to an appeal allowed in the above entitled case, and to include in such transcript of record the following and no other papers or exhibits, to wit:

1. Complaint, Summons and Service on the defendant, Southern Pacific Company;

2. The Answer and Service of Answer by the defendant, Southern Pacific Company;

3. Notice of trial;

4. Verdict of the jury;

5. Judgment on the verdict; [24]

6. Motion for New Trial;

7. Minute Order;

8. Ruling on motion for new trial;

9. Notice of denial of new trial;

10. Notice of appeal;

11. Stipulation waiving bond on appeal;

12. Plaintiff's motion for a directed verdict;

13. Minute order denying said motion;

14. All minute orders made by the Clerk during the entire proceeding;

15. Reporter's transcript of proceedings, original and copy of which are submitted herewith to the Clerk;

16. Statement of the points on which appellant intends to rely on appeal.

The plaintiff, appellant herein, having requested the entire record, including the reporter's transcript of the entire proceedings, to be prepared and forwarded to the United States Circuit Court of Appeal, Ninth District, no statement of the points upon which appellant intends to rely on his appeal will be presented to the District Court of Appeal; that the same will be presented to the Circuit Court of Appeal at the proper time.

Dated: July 20, 1948.

HILDEBRAND, BILLS & McLEOD,
By D. W. BROBST,
Attorneys for Plaintiff.

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed July 22, 1948. [25]

[Title of District Court and Cause.]

STIPULATION WAIVING BOND ON
APPEAL

It Is Hereby Stipulated that bond on appeal (cost bond) Rule 73C and supersedeas bond (stay of execution bond on appeal) Rule 73D, is hereby waived.

This stipulation is made and entered into in lieu of the posting of any bond or bonds by the plaintiff James E. Everett, provided for under Federal

Rules of Procedure, Title 28, Rule 73C and Rule 73D or otherwise.

HILDEBRAND, BILLS & McLEOD,
By D. W BROBST,
Attorneys for Plaintiff.

JOHNSON, RICKSEN, FREEMAN
& JOHNSON,
By STANLEY JOHNSON,
Attorneys for Defendant.

[Endorsed]: Filed July 22, 1948. [26]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good Cause Appearing Therefor, it is hereby ordered that appellant above named may have to and including the 13th day of November, 1948, within which to prepare and file record and docket of cause.

Dated: October 25th, 1948.

DAL M. LEMMON,
Judge of the Above Entitled Court.

[Endorsed]: Filed Oct. 25, 1948. [27]

District Court of the United States, Northern
District of California

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 27 pages, numbered from 1 to 27, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of James E. Everett, Plaintiff, vs. Southern Pacific Company, a corporation, Defendant, No. 27709-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$6.30 and that the same amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 8th day of November, A.D. 1948.

[Seal]

C. W. CALBREATH,
Clerk.

[28]

In the Southern Division of the United States District Court for the Northern District of California.

Before: Hon. Dal L. Lemmon, Judge.

No. 27,709-G-L

[Title of Cause.]

REPORTER'S TRANSCRIPT

Tuesday, April 6, 1947

Appearances for the Plaintiff: B. W. Brost, Esq.
For the Defendant: James R. Freeman, Esq.

(A jury having been impaneled and sworn to try the above-entitled cause, an adjournment was taken until tomorrow, Wednesday, April 7, 1948, at 10:00 o'clock a.m.) [1*]

Wednesday, April 7, 1948, 10:00 o'clock a. m.

The Clerk: Everett vs. Southern Pacific Company.

Mr. Freeman: Ready, your Honor.

Mr. Brobst: Ready.

The Court: You may proceed.

Mr. Brobst: If the Court please, ladies and gentlemen of the jury: At this time I will make a short opening statement so that you may be better able to follow the testimony as it is given to you on the witness stand. I don't know whether any of you have tried actions of this kind, or not, an action which arises under the provisions of the Federal Employers' Liability Act. It is different from the

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

ordinary negligence action that you may have tried.

This act gives the workman who is engaged in interstate commerce, working for a common carrier by rail, the right to sue the employer in the event that he is injured in the course of his employment. For those employees who are engaged in that type of work there is no workmen's compensation act. In other words, their only right of recovery is under the provisions of the Federal Employers' Liability Act.

Now, included in the Federal Employers' Liability Act there are two other acts that are known as Safety Appliance Acts, and one has to do with hand-holds and brakes, and the other has to do with engines and tenders. [2]

Now, so that you will be better able to follow the evidence, the Federal Employers' Liability Act requires that the plaintiff establish negligence upon the part of the defendant. However, if there is a violation of any of the safety appliance acts that establishes negligence. In other words, then the liability of the carrier becomes absolute and there is no defense that the employer may have exercised ordinary care. If something breaks that is a safety appliance, that falls within the purview of these acts, the employer is absolutely liable, there is no defense of the use of ordinary care by the employer. In other words, the employer becomes an insurer for that type of defect.

Now, the evidence in this case will bring the case within that class of cases where there is a violation of one of the safety appliance acts. The evidence will show in this case that the plaintiff was working

as a fireman for the Southern Pacific Company down in their yards at Santa Barbara, and the accident happened last July the 14th, that is, July 14th of 1947. They came out into the yards at Santa Barbara, and it was the fireman's duty to place what was known as markers or indicators on the front of the engine.

You have all seen high up on front of the engine those "X" numbers that sometimes say, "X-428," or whatever it is. Well, it is the fireman's duty after the train is made up and ready to start to put the numbers of the train up on the indicators. [3]

Well, the evidence will show that on this morning, I believe it was about 10:35 in the morning. he went out and climbed up on the front of the engine to put the markers up, and as he started down the steps he took hold of the hand rail that is provided there on the engine to enable him to come back down the steps, and as he did so and put his weight on the hand rail it pulled out. The hold rail just came loose from the bracket on the engine and he fell backwards and landed in a sitting position on the roadbed. He fell approximately eight feet.

That will be the evidence that brings the case squarely within the purview of the Safety Appliance Act.

I don't believe the defendant will contest that portion of the case.

The facts will show he sustained a rather severe injury to what is known as the coccyx. That is the tip end of the spinal cord. The evidence will further show that the man suffered from some type of congenital condition there. The medical men

feel, on the other hand, this type of thing does develop from trauma. However that may be, whether it is an aggravation of a pre-existing condition, or whether it was one which was aggravated by this trauma, the man has been disabled from his employment.

He has a painful injury. It is not what we term a critical [4] injury, but the evidence will show it is one that causes him so much pain in his employment that he cannot at the present time carry on his occupation as a fireman, and the evidence will show that the period of disability is just undetermined; that because of the condition of the low part of the spine doctors do not like to recommend surgery, so the man has just been left in a condition of suspense and anxiety, because he is unable to return to work and the medical men will not give him any definite information as to when he can return to his work as a fireman.

And the evidence will further show that prior to his becoming a fireman he did heavy work in the oil fields, roustabout and laborer and that type of work, and that the injury also prevents him from doing that type of work.

As I say, although it is not a critical injury, the evidence will show that it is one that is disabling, as far as the type of work that this man has performed throughout his life.

Mr. Freeman: Your Honor, I would like to reserve my opening statement—

The Court: I was just thinking, Mr. Freeman, that it would be helpful to the Court and the jury

if you would state what is conceded and what is denied so as to have the issues clearly defined.

Mr. Freeman: I will be glad to do that.

This is a situation, as Mr. Brobst stated—there was [5] no witness to the accident. There is no doubt about the fact that Mr. Everett is the only one who saw this particular defect before, if it was seen at all. He said it wasn't visible on the outside. Afterwards when he was on the ground he saw the hand hold was pulled loose. There is no doubt about those particular facts.

Whether or not that is a proximate cause of the accident only Mr. Everett can say, and I believe it is a matter of fact that should be left to the jury. However, there is no dispute about what I have just stated.

Our position is, and I will elaborate a little further, our position is that a great many things Mr. Everett says we do not believe to be true, and we will endeavor to prove that they are not, and under those circumstances we would like to leave the matter to the jury for determination.

The Court: Mr. Freeman, it is admitted that both the plaintiff and the defendant were engaged in interstate commerce at the time of the accident?

Mr. Freeman: Yes, it is admitted in the answer. And it will be admitted that the hand hold, when Mr. Everett saw it, was apparently in good condition.

The Court: And is it admitted that the plaintiff was an employee of the Southern Pacific Company,

acting within the scope of his employment at the time of the accident?

Mr. Freeman: No doubt about it, he was on duty at the [6] time.

But whether or not there was a defect in the hand hold on the right side—apparently there was if it pulled out as stated, but that is a matter I would like to leave to the jury's decision.

Mr. Brobst: I wonder if there would be one more admission: That the hand hold was found broken and in this pulled off position after the accident.

Mr. Freeman: That is correct. There is no doubt that if the defective hand hold caused the accident the Safety Appliance Act applies in this case, but I would like to leave to the jury the question of whether or not the defective hand hold caused the injury.

As Mr. Brobst stated—he described the law to you and you heard the discussion with his Honor as to just what the picture will be—Briefly, our position in this case is this: Mr. Everett claims an injury on July 14, 1947. He was treated, I believe the evidence will show beyond any dispute, by what is called in a loose phrase company doctors, which actually are not company doctors, they are doctors of the Employee's Hospital Benefit Association, an association which is operated by the employees, themselves, governed by a majority of the employees on the board, a majority of the employees are members of the Railroad Brotherhood, they hire these doctors and provide the facilities, and Mr. Everett

[7] paid his dues and he is entitled to the hospitalization there.

Have you subpoenaed the records?

Mr. Brobst: No, I haven't.

Mr. Freeman: I will subpoena them and I will try to get them here this afternoon. We will present the whole hospital picture by doctors who treated this man, doctors who had him under care, not doctors for the purpose of litigation, but for treatment, they say this man is able to go back to work, they say, and I am sure the record will bear this out, that the symptoms he alleges are exaggerated, that the injury is one that is not detectible by any medical science that has been discovered; no factors or no nerve involvement have been found, other than his complaints. They believe and they will come into court and testify, if necessary, that in their opinion he should be back to his work, and in our opinion he should be back to work, and I believe the evidence will show he has been for several months, and that is a matter I would like to leave to you for your decision.

JAMES ELMER EVERETT,

called as a witness in his own behalf; sworn.

Mr. Brobst: Q. Mr. Everett, where do you live, please?

A. 116 Castile Street, Santa Barbara.

Q. How long have you lived down there in Santa Barbara. A. Five years. [8]

Q. Now, back in July of 1947, what was your business or occupation? A. Locomotive fireman.

(Testimony of James Elmer Everett.)

Q. And when did you first go to work for the Southern Pacific Company. A. July 21, 1946.

Q. Now, prior to your being employed by the Southern Pacific Company as a fireman, what type of work did you do? A. Oil fields.

Q. And in the oil fields, what type of work?

A. Rotary helper, roustabout. I worked in the production department.

Q. This train that you were working down there on the morning of July 14, 1947, what type of train was that? A. Local freight.

Q. At the time the accident happened was the engine coupled on to the freight cars?

A. Yes, sir.

Q. Have you any idea how many freight cars it was hauling?

A. I couldn't say for sure; between 18 to 25. That is what we usually had.

Q. Now, is there some place on the engine where you number your train or designate it? A. Yes.

Q. Where is that, please? [9]

A. The indicator box.

Q. And where is the indicator box located?

A. It is on top of the boiler, at the smokestack.

Q. Now, also there are places for the train crew to stand when going up to put these numbers in the indicator box? A. Yes.

Q. What is that called?

A. The running board.

Q. And where does that extend?

(Testimony of James Elmer Everett.)

A. From the front of the cab to the front of the engine.

Q. Now, is there anything on the engine, itself, that you hold on to as you go up and down?

A. Yes.

Q. What is it? A. Hand rail.

Q. And what is that made of, please?

A. It is about an inch-and-a-half pipe.

Mr. Brobst: I have some pictures here. I think that is the same engine (exhibiting to Mr. Freeman). I would like to offer these pictures—First, I will have them identified.

Q. Mr. Everett, I will show you this picture, first, and ask you if that is not the actual engine that was involved, which shows the handrail and the running boards, and the steps leading up to the indicator box, and the indicator box? A. Yes.

Mr. Borbst: We will offer this as Plaintiff's No. 1, your Honor.

The Court: It will be received. Hand it to the clerk.

(The photograph was marked Plaintiff's Exhibit No. 1 in evidence.)

Mr. Brobst: Q. And likewise I will show you another picture. That is the same engine except a little closer view, is that correct?

A. That is right.

Mr. Brobst: I will ask that that be admitted, your Honor, as Plaintiff's next.

(Testimony of James Elmer Everett.)

The Court: It may be received, and after it is marked hand both of them to the jury.

(The photograph was marked Plaintiff's Exhibit No. 2 in evidence.)

Mr. Brobst: I don't know but what, first, your Honor, we might designate these various things by marks so that the jury can understand them.

The Court: What various things do you want to mark?

Mr. Brobst: The indicator box and the running board and the handrail.

The Court: Isn't that obvious to anyone?

Mr. Brobst: Well, if there is any question I presume the jurors can ask.

(Photographs Exhibits 1 and 2 were handed to the jury.) [11]

The Court: I think you may proceed. You may proceed with your questions.

Mr. Brobst: Q. What time did you go to work that morning, Mr. Everett? A. 10:10 a.m.

Q. And what time did the accident happen?

A. About 10:35 a.m.

Q. Now, how do you find out what the designation of your train is going to be?

A. Well, the conductor gives orders through the dispatcher. They are all typed out on paper, and he brings them to the engine.

Q. And how did you find out what numbers to put up in the indicator box?

A. The conductor handed me the orders up on my side of the engine, and I looked at them. We

(Testimony of James Elmer Everett.)

were running Extra 1823, and I went out to the front to put up X-1823.

Q. Whose duty is it to put these marks up on the engine? A. The fireman's.

Q. And did you start out to put up the indicators? A. Yes.

Q. Where do they keep the numbers?

A. In a box behind the indicator. There is a little box behind the indicator.

Q. It is right behind the indicator box?

A. Yes. [12]

Q. All right. Did you get the numbers to put in the indicator box? A. Yes.

Q. Then what did you do?

A. I turned around to come down the steps backward and I had hold of the handrail with my left hand, and I fell.

Q. And what happened?

A. The hand rail came out and I fell.

Mr. Brobst: Well, I was going to use one of the pictures—

The Court: Q. You mean the handrail pulled away?

A. It came out of the bracket that holds it.

Mr. Brobst: Q. This is Plaintiff's Exhibit No. 1, and, Mr. Everett, would you just indicate here with a pen mark where it was that handrail came loose?

A. (The witness marks on photograph.)

Mr. Brobst: That is an "X" that you marked there. This may be a little leading, but that is the

(Testimony of James Elmer Everett.)

bracket which is approximately in the center left-hand side of the engine? A. Yes.

Mr. Brobst: I will make that a little darker (marking on photograph). I will mark that on Plaintiff's Exhibit No. 1 as E-1 (marking on photograph).

I would like to pass this to the jury again. It shows the point where the handrail gave away. It is marked as E-1 on Plaintiff's Exhibit No. 1. [13]

The Court: It is marked with a cross now?

Mr. Brobst: It is marked with an "X", yes, sir, and the "X" is designated by "E-1."

Q. All right, Mr. Everett, what happened to you when this handrail pulled out?

A. I fell on the ground.

Q. In what position did you land?

A. A sitting position.

Q. And approximately how high is it from that running board on the side of the engine down to the ground? A. Eight feet.

Q Now, were you able to continue work that day? A. No.

Q. Where were you taken from the Santa Barbara Yard, where the accident happened.

A. St. Francis Hospital.

Q. And where is the St. Francis Hospital located? A. Santa Barbara.

Q. And were you in any pain? A. Yes.

Q. And where was that pain localized?

A. Lower back.

(Testimony of James Elmer Everett.)

Q. And when you got to the St. Francis Hospital who treated you there?

A. Dr. Harry E. Brown. [14]

Q. Is he a doctor that is down there connected with the Southern Pacific?

Mr. Freeman: You mean the Hospital Association?

Mr. Brobst: Q. The Southern Pacific Hospital Association, we will put it that way so we won't get to bickering about terms. All right, how long did you stay there in the St. Francis Hospital?

A. Four days.

Q. And what type of treatment did they give you, if any, while you were there?

A. They didn't give me any—X-rays.

Q. Just stayed in bed? A. Yes.

Q. Did they give you anything for the pain you were having in your back?

A. Yes, give me pain pills.

Q. Then after four days in the hospital what was done for you?

A. I was sent to the S. P. Hospital in San Francisco.

Q. Came up to the Southern Pacific Hospital here in San Francisco? A. Yes.

Q. And how long did you remain here when they sent you up the first time?

A. From the 19th of July until the 11th of August.

Q. And what doctor treated you?

A. Dr. McRae, Dr. Steiner, and Dr. Haynes. [15]

(Testimony of James Elmer Everett.)

Q. And what treatment was given to you, if any?

A. Electrotherapy treatment.

Q. Just speak right up so we can hear you.

A. Electrotherapy treatment, and injected novocaine, eupercin and oil.

Q. And how often were those injections given to you? A. About once a week.

Q. And you say they gave you treatments?

A. Yes.

Q. How was that administered to you?

A. Well, they have two pads. They put one on your back and one on your stomach and turn on the juice.

Q. I see. All right, then, after you had received those treatments and injections at the General Hospital here in San Francisco were you sent back to Santa Barbara? A. Yes.

Q. And whose care were you under down at Santa Barbara when you went back?

A. Dr. Harry Brown and Dr. Stevens.

Q. And what treatment did those doctors give you down there?

A. Dr. Stevens injected novocaine in my back, and Dr. Brown give me pills for pain.

Q. Now, were you having any pain during this period? A. Yes.

Q. And where was the localized? [16]

A. Lower back.

Q. Was there anything else about that besides the pain? A. Oh, pain in my legs.

(Testimony of James Elmer Everett.)

Q. And where did that pain originate, and where did it extend to?

A. It started at the tip end of the coccyx and ran down the back of my legs.

Q. Now, did they give you anything to use to alleviate the pain? A. You mean to sit on?

Q. Yes. A. Yes.

Q. What was given to you?

A. A small rubber inner tube.

Q. And who gave you that? A. Dr. Haynes.

Q. That is here in the San Francisco General Hospital? A. Yes.

Q. Southern Pacific General Hospital. Have you tried to use that? A. Yes.

Q. All right. Then you were down in Santa Barbara under the care of Dr. Brown, is that right? A. That is right.

Q. And did you again come back up to San Francisco to the [17] Southern Pacific General Hospital?

Mr. Freeman: Your Honor, it is always being referred to as Southern Pacific General Hospital. It is the Southern Pacific Employees' Hospital Association.

Mr. Brobst: I am willing to enter into this stipulation, that every time I refer to the Southern Pacific Hospital in San Francisco I mean the hospital that is operated by the Southern Pacific Hospital Association. That is a long word to say each time.

Mr. Freeman: As long as that is clearly understood, your Honor.

(Testimony of James Elmer Everett.)

Mr. Brobst: I am not trying to evade anything.

Q. And then you came back up here to San Francisco to the hospital that is maintained by the Southern Pacific? A. Yes.

Q. When was that? A. December 1st.

Q. What year? A. 1947.

Q. Who sent you here?

A. Dr. Harry Brown.

Q. And why was it that you came up on that occasion?

A. Well, he suggested that I come back—they might find something that they did not find before.

Q. And how long were you there the second time? [18] A. Two weeks.

Q. And what treatment was given to you then?

A. Novocaine injections in my spine.

Q. They then continued the same type of injections? A. Yes.

Q. Were you having pain? A. Yes.

Q. All right. Then following that two-week treatment did you again go back to Santa Barbara?

A. I went back for 30 days.

Q. And were you released to go to work on that occasion? A. No.

Q. All right. Then after you were back down at Santa Brabara for 30 days did you again come back up here to San Francisco? A. Yes.

Q. That was the third time? A. Yes.

Q. And how long were you here in the hospital in San Francisco on that occasion?

(Testimony of James Elmer Everett.)

A. From the 15th of January until the 2nd of February.

Q. About two weeks? A. About two weeks.

Q. And what treatment did they give you on that two weeks occasion? A. More novocaine.

Q. They just continued giving you the novocaine injections? [19] A. Yes.

Q. And were you having any pain during that time? A. Yes.

Q. As a matter of fact, Mr. Everett, would you state whether or not you have been free of pain in your coccyx and lower back at any time since the happening of the accident? A. No.

Q. Now, then, after this last trip—third trip, were you released to go to work? A. Yes.

Q. Did you attempt to go to work? A. Yes.

Q. And what was the date that you attempted to go to work, Mr. Everett?

A. February 9, 1948.

Q. And what type of job did you attempt to do?

A. Firing a switch engine in the Santa Barbara yards.

Q. And what happened to you?

A. I had to be relieved after four hours.

Q. And why did you have to be relieved after four hours?

A. Well, the pain from the tip of my coccyx down my legs, and then I couldn't sit down any longer.

Q. Now, are these switch engines easy riding or free from vibration? A. No. [20]

(Testimony of James Elmer Everett.)

Q. What is it that causes you to have that pain when you sit in one of these engines?

A. Vibration, bouncing up and down, and turning from one side to the other.

Q. And did you attempt to use this inner tube that they gave you? A. Yes.

Q. Did that do any good in the engine?

A. No.

Q. Well, then, after those four hours, did you report the difficulty that you had to Dr. Brown?

A. Yes.

Q. And what did he do for you, if anything?

A. No.

Q. Did he send you back up here to San Francisco? A. No.

Q. What treatment have they prescribed for you, if any?

A. Well, the doctor in the hospital here said if I couldn't fire an engine I would have to get another job.

Q. If you couldn't stand the firing job you would have to get some other type of work? A. Yes.

Q. But did any of those doctors ever tell you when you would be free of this pain in your coccyx?

A. No. [21]

Q. Just told you you had to make the best of it, is that correct? A. That is right.

Mr. Brobst: Have you the earnings?

Mr. Freeman: I have them here, but I haven't added them up on an adding machine, and I wouldn't want to trust my addition.

(Testimony of James Elmer Everett.)

Mr. Brobst: Q. Mr. Everett, approximately how much a month were you earning? A. \$300.

Q. And when you were given these novocaine shots, did that relieve the pain? A. Yes.

Q. Was that a permanent relief from the pain?

A. No.

Q. About how long would it relieve the pain in the coccyx? A. Two to three hours.

Q. Then it would come back again? A. Yes.

Q. And how is it right now as of today? Do you feel the condition is improving, is it stationary, or is it progressively getting worse?

A. It is getting worse.

Q. You feel that it is getting a little worse?

A. Yes.

Q. Has the defendant offered you any other type of employment? [22] A. No.

Mr. Brobst: I think you can cross examine.

Cross Examination

Mr. Freeman: Q. Have you asked for any other type of employment? Have you asked for any other type of employment?

A. No, I haven't.

Q. You went up on this engine on July 14, 1947, is that correct? A. Yes.

Q. To fix the indicator? A. Yes.

The Court: I see a doctor in the courtroom, if you wish to put him on out of order.

Mr. Brobst: That would be fine. I would like to speak to him for just one minute. If we could take just one minute out, I could put him on.

DR. F. J. CARLSON,

called as a witness on behalf of plaintiff; sworn

Direct Examination

Mr. Brobst: Q. Doctor, you are a duly licensed and practicing physician and surgeon, with your office located in the City of Oakland? A. Yes.

Q. Of what medical school are you a graduate, Doctor? [23] A. Northwestern University.

Q. And when did you graduate? A. 1919.

Q. You have been practicing your profession ever since? A. Yes.

Q. Have you specialized, Doctor, in any particular branch of medicine? A. In orthopedics.

Q. And how long have you specialized in that?

A. I trained in orthopedics immediately after graduation, and have stayed with it.

Q. Now, Doctor, did you have occasion to examine Mr. Everett, the plaintiff in this case?

A. Yes, I saw him on two occasions.

Q. Those examinations were made at the request of the attorneys, is that correct? A. Yes.

Q. For the purpose of diagnosing his condition so you could testify? A. Yes.

Q. All right. Doctor, when first did you see the plaintiff? A. January 14, 1948.

Q. And did you see him in your office?

A. That was at my office.

Q. And what tests did you make to determine what might be his [24] injury?

A. First, a clinical history of an accident and a fall, and a physical examination.

(Testimony of Dr. F. J. Carlson.)

Q. What history did he give you, Doctor?

A. The patient had an accident on July 14, 1947. He fell for a distance of 8 or 9 feet to the right of way and struck on his seat—on his back; following that there was immediate pain in the tailbone area, so that riding or sitting on any kind of seat was uncomfortable; he had complaints that the legs bothered him all the time, backs of the thighs, and half way down to the calf of the leg on each side. There is pain, mostly on the right side, on sitting. At night there is paresthesia in the lower extremities; that is, a feeling like fingers pinching his legs. The feet go to sleep a good deal.

That is the description of this trouble. He had not had previous injuries referable to this area.

Examination shows a heavily built man five feet 10 inches tall, weight 225 pounds. The patient does not limp; he stands in good posture; he has normal back mobility.

Muscle measurements were made. In the right calf there is a quarter inch less circumference than in the left. That is not significant. Otherwise the thigh measurements are equal.

There is no straight leg raising sign, and no sciatica pain.

I made tests for skin sensation, response to pin prick. I didn't identify a decided field of sensory loss.

The coccyx is exquisitely tender.

Q. What do you mean, Doctor, by "the coccyx is exquisitely tender"?

(Testimony of Dr. F. J. Carlson.)

A. It is just too touchy for any comfort.

Q. How did you determine that, Doctor? What type of test?

A. External finger examination. I also made a rectal examination with the finger. The tenderness extends over the upper sacral segments, close to the midline.

I made records of the reflexes. They are apparently approximately equal. They are not very active.

At this time I did not have X-rays, they were not available on that day.

I made a diagnosis of a traumatic coccydynia. That is an imposing word, but means simply that he has pain the tailbone. [26]

I wasn't satisfied with the extent of this observation or examination at the time and wished to continue it.

I noted particularly his complaints of paresthesia in the leg, which should be further observed.

The patient was offered a special device to make sitting a little more comfortable, a divided seat made of two leaves of the seat, all tied together so as to relieve the pressure on his midline areas in sitting.

That, I think, is the extent of the observations made at that time.

Q. Now, Doctor, did you see him again later on?

A. I saw him again on March 1, 1948.

Q. And what was his condition at that time, Doctor?

(Testimony of Dr. F. J. Carlson.)

A. Approximately unchanged. He had just as much tenderness in the coccyx on any direct pressure. He had not returned to work.

Q. Doctor, what type of treatment can you give for a condition such as that?

A. You can leave it alone or you can operate on it. I am speaking of the tailbone pain, persistent tailbone pain. When I say leave it alone, I mean use such measures as are simple and direct, like an arrangement of the seat, and on many occasions a change of occupation for a while. The approach is that with an accidental injury the painful area of this kind, it will improve in the course of a long number of months. The [27] other approach is to remove the tailbone. That leaves also a tender area which will be improved over a number of months—we hope it will.

Q. Now, is there anything unusual in this man's coccyx that might cause you to hesitate to do any type of operating?

A. No, I wouldn't hesitate to operate if obliged to, if he does not improve. The coccyx and sacrum are unusual; they show congenital malformations.

Q. Doctor, what other—well, I will put that question this way: Did your examination, clinically or by X-ray, indicate any bony injury to the coccyx?

A. Yes, the clinical examination indicates a bony injury.

Q. What is that, Doctor?

(Testimony of Dr. F. J. Carlson.)

A. I cannot define it any closer than that. To prove that this is a fracture, you need to see a fracture line in the pictures and I cannot see that in the pictures made. They are not perfect in technique, and the area is difficult in this subject anyway. I have often recognized with closer examination fractures in the coccyx area that have been overlooked in that type of cases frequently in this area, and I don't believe the X-ray examination are as reliable as the clinical findings are on that point.

Q. Why is that, Doctor?

A. It is just difficult to identify a fracture line in that area because of the large body that hides detail and because the [28] fracture line does not always lie in a plane that you can X-ray. I have particular reference here when there is a previous malformation that will confuse any displacement that may take place in an accident.

Q. Now, will you take these X-rays and select from them the ones that will indicate that area where you can point out the condition of that coccyx. We have to identify them first.

A. Are these marked?

Q. No.

A. Those were films submitted to me through Dr. Catton made by the office of Ingebar.

Mr. Brobst: Do you have any objection to these?

Mr. Freeman: I assume the Doctor can identify them. Dr. Catton took them?

Mr. Brobst: No, they were taken by Dr. Inge-

(Testimony of Dr. F. J. Carlson.)

bar, who evidently is the roentenologist that takes them for Dr. Catton.

Mr. Freeman: I assume they have gone through the regular channels to Dr. Carlson?

Mr. Brobst: Oh, yes. I will offer this X-ray as plaintiff's next in order, No. 48431, which shows it was taken on 1/15/48.

Mr. Freeman: Does it have his name there, Mr. Brobst?

Mr. Brobst: Yes. Mr. James Everett, taken here in San Francisco. I offer that next in evidence.

The Court: Received. [29]

(The X-ray film was marked Plaintiff's Exhibit No. 3 and received in evidence.)

Mr. Brobst: Q. Now, if you will just point out the area there of the coccyx and make what explanation you deem necessary, Doctor.

A. In the first place, you can disregard these two large black marks. They are simply an air bubble; one of the first things you see; an air bubble in the bowel. This is the midline of the lower portion of the sacrum (indicating) and at this point we come over into the coccyx, into this triangle. This lower segment of the coccyx departs from the midline emplacement and departs in alignment. This long axis runs at this angle (indicating). The outline of the sacrum on this side is different from the one on this side. It simply is not symmetrical, although the rest of the pelvis is symmetrical. The picture is taken in a true anterior-

(Testimony of Dr. F. J. Carlson.)

posterior direction. Both the sacrum, the lower portion of it, and the coccyx are tipped sharply to one side.

This is the area where I would look for fracture (indicating). There are two wide shadows there and a little dark line between, but I am not prepared to state on oath that that would indicate that is a fracture, because I know that this was twisted before he had the fall. The pictures are produced after the fall, and they go through a heavy part.

Now, here is another important deviation from the normal. [30] This cone-shaped shadow is an open sacral canal; that corresponds to the continuation of the canal through which the spinal cord runs. The spinal cord stops well above this point, and this canal contains nerve trunks. At each sacral segment a number of these nerve roots deviate outward from this sacral canal, and the ones that come this far down, the lower sacral and the coccygeal ones, are exposed without bony protection through this whole area (indicating). Approximately every sacral segment. Please don't be misled by the overlying shadows. This round one is an air bubble in the bowel, but this is a bone defect.

Q. Doctor, is that condition—I will put the question this way: Is that type of back or sacrum more subject to injury than a normal one?

A. Yes. The nerve trunks are open, they don't have a roof over them at that point which they should have.

Q. In other words, there is a hole in there that

(Testimony of Dr. F. J. Carlson.)

he has had since birth, probably, that exposed the nerve roots that should be covered? A. Yes.

Q. That makes them much more susceptible to injury?

A. Yes. This is a side view of the same back in the same area.

Q. Let me have that marked as plaintiff's next in order, which should be No. 4, and your testimony then will be related to [31] Plaintiff's Exhibit 4.

(The X-ray film referred to was thereupon marked Plaintiff's Exhibit No. 4 for identification.)

The Witness: A. Exhibit No. 4 is a side view which is very similar to show further evidence of malformation in the lower sacrum. This picture unfortunately cuts out the coccyx, but this double outline offset here is not normal.

This film—

Mr. Brobst: We will offer that in evidence, your Honor, as next in order. It was taken 2/3/48, and it is No. 481051.

The X-ray film dated 2/3/48 was thereupon received in evidence as Plaintiff's Exhibit No. 5.)

The Witness: A. That is too high for the coccyx. It shows the upper portion of the sacral defect.

Mr. Brobst: The next one will be No. 6 and it was taken 2/15/48, No. 48431. We offer that in evidence.

(Testimony of Dr. F. J. Carlson.)

(X-ray film dated 2/15/48 was thereupon received in evidence as Plaintiff's Exhibit No. 6.)

The Witness: A. It shows a definite deformity of the lower sacrum. It should be clear definitely in this picture that this is an offset here (indicating).

Now, here is a continuous cortex of the sacrum coming down to this level where the lower portion of the coccyx or the coccyx begins. This offset is a backward projection of the roof of that sacral canal. That should be closed in the middle [32] and made a cover. It points out backward.

Q. If any of those do not add anything—

A. This one has been described as No. 5. That is an additional film, that is identical with it.

This is a very good film to offer.

Mr. Brobst: We will offer this film, your Honor, to be marked next in order, which I believe is No. 7, taken 1/15/48.

(The X-ray film dated 1/15/48 was thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

The Witness: A. This is a localized film of sacrum and coccyx. It is better defined. You can follow the outline of this bone here. You can see the sacral defect—the central defect.

Q. Now, Doctor, let me ask you this—you have one more?

A. This one need not be offered. It adds nothing further.

Q. Now, Doctor, is the coccyx of normal size?

(Testimony of Dr. F. J. Carlson.)

A. No, it is too small.

Q. And is that something that is always the result of a congenital condition, or can it be caused by trauma?

A. The size, of course, is dependent on congenital malformation, but the tilt to one side can be caused by trauma. But I recognize a pattern in this that is almost inevitably pre-existing before his accident, but when he falls on it you don't know how much it has moved again.

Q. But because of that condition it is more subject to injury? [33]

A. It is not so much that the coccyx is more subject to injury. That is normally vulnerable to fall into the pattern, but in this case the defect in the lower portion of the sacrum deprives the nerve roots in that area of their normal bony protection.

Q. What kind of a prognosis can you give for this man going back to work as a fireman?

A. He certainly couldn't work for many months, but eventually he should be able to sit on the fireman's stool. If it does not respond after long waiting, he should have an operation.

Q. Well, it has been nine months. Is that a long time or longer than usual?

A. It is longer than usual. I consider six months a good practical trial period.

Q. Do you feel the man's condition at this time indicates surgery?

A. When I saw him in March I felt that anybody would well warrant him surgery there.

(Testimony of Dr. F. J. Carlson.)

Mr. Brobst: That's all I have.

The Court: We will take a recess.

(Recess.)

Cross Examination

Mr. Freeman: Q. I have your report here, Dr. Carlson. Any time you want to look at it you can just let me know. I see in your report that the plaintiff told you he fell a [34] distance of eight or nine feet landing first on his coccyx. A. Yes.

Q. In other words, that was what struck the ground first. A. Yes.

Q. And I assume that has entered into your conclusions reached in this case, that fact?

A. It is not very important to me.

Q. In other words, it would not be very important to you that he fell and landed on his coccyx?

A. No, the point is that I don't trust the patient's first impression of the instant of accident.

Q. This particulaar patient?

A. They are apt to reconstruct and one should always have that in mind.

Q. In other words, the fact that he told the other doctors he landed on his feet first, you would not discount that? A. I didn't hear that.

Q. Well, you are hearing it now.

A. Well, I am not surprised.

Q. I won't make any observation on that.

I see, Doctor, he told you he has a *paresthesia*.

A. Yes.

Q. What is a *paresthesia*?

A. Disordered types of sensation.

(Testimony of Dr. F. J. Carlson.)

Q. That was what he told you? [35]

A. Yes, sir.

Q. Could you find anything to show a paresthesia? A. Not definitely.

Q. What do you mean by "not definitely"?

A. I tested him for response to pinprick sensation, but could not define areas of loss. Of course, a paresthesia by definition is an abnormal disordered sensation and is not the same as a sensory loss.

Q. Would you explain that further? What do you mean, it is not the same as a sensory loss?

A. It may be referred to an area which hasn't been hurt at all and it may be observed by the patient as sensations not described as pain. I think he describes his as pinching, didn't he?

Q. That is what you have written here.

A. Yes.

Q. I want to be sure you answer this question, Doctor: Did you find anything in your examination, not what he told you, to indicate there was any paresthesia?

A. No, I can't find on examination paresthesia. That is the patient's description.

Q. What is a subjective complaint, Doctor?

A. The patient's complaint.

Q. In other words, something he told you?

A. Yes.

Q. Not what you find yourself? [36]

A. That's right.

(Testimony of Dr. F. J. Carlson.)

Q. In other words, what you found would be objective? A. Yes.

Q. If I had a broken arm and it was sticking off at one side and I said I had a broken arm, you could see that. A. Yes.

Q. That would be objective? A. Yes.

Q. But if I said my arm was broken and you could not find anything wrong with it, that would be purely subjective? A. That would be.

Q. In other words, you see nothing to which you could diagnose, and I am reading from the report, "that his complaints of paresthesia are not supported in clinical examination."

A. That's correct.

Q. Doctor, did you find any injury to the sacrum? A. Not that I could prove.

Q. Well, we are here to prove. These are matters of proof.

A. The basis for the answer is that I do find pain and tenderness in the upper portion of the sacrum, also by the radiographic findings, which are not conclusive.

Q. You say you find pain?

A. Pain and tenderness in the upper portion of the sacrum.

Q. Is that again subjective?

A. The tenderness is not, of course, subjective. That is [37] distinctively objective. Pain is a subjective finding.

Q. What he told you? A. Yes.

Q. I see you have in your report, "in the present

(Testimony of Dr. F. J. Carlson.)

examination I make no findings beyond the injury to the coccyx." Do you want to change that?

A. That point was left open at the time.

Q. Doctor, you have examined a great many people for the purpose of testifying, and at this particular time you were contemplating testifying, isn't that correct?

A. No, I didn't. It is quite likely that this matter was already a matter of litigation, but I didn't know it at the time.

Q. You mean when he was sent to you by the Hildebrand office you did not know there was litigation involved?

A. No, I did not know there was litigation involved at that time. I knew, of course, he was taking legal advice.

Q. Doctor, how many people do they send to you a year concerning which you don't know that there is litigation involved?

A. I have made it a point to keep your mind free of the litigation angle in the examination. I don't want to record it or know about it and if I could I would also keep my mind free of the particular parties involved, but that is sometimes impossible.

Q. You mean whether you like me or not doesn't make any difference? [38] A. No.

Q. I am very curious about this, Doctor, and maybe you can answer the part of the question I asked you before: How many people do you examine for Mr. Hildebrand's office or for Mr. Brobst's office in Oakland?

(Testimony of Dr. F. J. Carlson.)

A. I don't know how many.

Q. Would you hazard a guess how many a year you examine? A. No, I wouldn't.

Q. Would it be more than ten?

A. Yes, it would be more than ten, but don't crowd me one at a time like an auctioneer because it is not really a good answer.

Q. I am trying to find out whether you expect that litigation is involved. Do you handle a hundred? A. I can't tell you that.

Q. Would you say no?

A. I won't say either no or yes.

Q. How long is the coccyx, Doctor? Not anyone's coccyx, but how long is the coccyx of Mr. Everett?

A. This seemed to be about $\frac{5}{8}$ of an inch long at the angle at which we see it.

Q. Will you indicate to the jury about how long it is?

A. About that long. However, that is too short, but that is what it looks like in the picture.

Q. You would say it is about that, and we are referring to Mr. [39] Everett's coccyx?

A. You see it at an angle and you don't get the full length from the view.

A. Does it serve any useful purpose?

A. Well, it is a residual—well, the only useful purpose is to protect the coccygeal nerves.

Q. I think you told us because of congenital defects these are already exposed.

A. The lower sacral ones are exposed.

(Testimony of Dr. F. J. Carlson.)

Q. The operation in there wouldn't expose them any more than they are now?

A. Inevitably you would cut away the coccygeal nerve if you removed the coccyx.

Q. How about the sacral nerve?

A. You shouldn't have to disturb the lower sacral nerves.

Q. About how long would a man be disabled if the coccyx were taken out, this $\frac{5}{8}$ of an inch piece?

A. That varies so much that no one can arrive at a rule on it.

Q. Have you performed that operation?

A. Yes.

Q. In a man of Mr. Everett's physical condition?

A. Physical condition hasn't any bearing on this.

Q. Doctor, you are here as an orthopedic expert. Would you wish to hazard an opinion on that?

A. The opinion is that the response is erratic and uncertain, [40] and it is no basis for prognostication, so I avoid the operation.

Q. In other words, you wouldn't hazard a guess how long he would be disabled if he had this $\frac{5}{8}$ of an inch piece removed?

A. I would not. I don't think you have a right to quote a time on that.

Q. You say you found the reflex O. K. in the leg? A. Yes.

A. Tendon jerks and response to skin stimulæ.

(Testimony of Dr. F. J. Carlson.)

Q. That is a test of the nerves?

A. A test of the nerves, yes. And I am aware at times another doctor has examined and found some variation.

Q. We are just concerned with your testimony, Doctor. A. All right.

Q. Did you find anything wrong?

A. No, I didn't.

Q. That means to you that the nerve channels up and down the leg are functioning properly?

A. The nerve trunks are functioning well. There is a little misconception in your mind; the reflexes, testing the knee jerk and ankle jerks involve roots higher than the ones under discussion.

Q. In other words, for anything affecting the legs, the nerve trunks come up higher in the back?

A. Of course, all the nerve trunks discussed affect the lower extremity and the perineum, but the particular reflexes I had in mind that were observed as showing variation come from the lumbar region.

Q. They don't come through the coccyx?

A. They don't come through the coccyx.

Q. These tests would indicate that those nerve trunks are functioning properly so far as the leg is concerned? A. Reasonably so.

Q. The straight leg sign, I see you found, was also normal? A. That is normal.

Q. What nerves are we talking about there?

A. Lumbar roots.

(Testimony of Dr. F. J. Carlson.)

Q. That would indicate, so far as you could see, that they were functioning properly, too?

A. Yes.

Q. I believe you also said that the motions of his back were normal?

A. Yes, he had good back mobility.

Q. Did you find any sign of the atrophy of the muscles?

A. A quarter of an inch in calf measurement, not to be recorded as an important finding.

Q. In other words, you might find that in any person, is that right?

A. That much variation is of no significance.

Q. In other words, there was no indication so far as you could see that he was favoring one leg in its use over the other?

A. No; he complains a little more on the right side, but I find an even walk and an even posture.

Q. He didn't limp. A. He doesn't limp.

Q. Now, this sacral defect you say is congenital?

A. Yes.

Q. And also the coccyx defect? A. Yes.

Q. By congenital you mean he was born that way? A. Yes.

Q. And it has nothing to do with the accident?

A. So far as whether it tilted it more in the accident I couldn't prove.

Q. You have been on the stand more than I have been in the courtroom; could you say from any of these pictures, any of the X-rays, that you found any fracture? A. No.

(Testimony of Dr. F. J. Carlson.)

Mr. Freeman: That's all.

The Court: Q. Doctor, could you define the association between the pains in his legs and this trauma?

A. It is very difficult to decide. I was not satisfied with my conclusions on the first examination and I wished to corroborate them and there could be variation in findings from time [43] to time, and the point is still open in my mind.

The Court: That's all. Is there anything further?

Mr. Brobst: I have nothing further.

Mr. Freeman: Just one thing. I used these two reports for the purpose of your testimony, Dr. Carlson. I would like to have them introduced in evidence.

The Court: They may be admitted in evidence.

(Reports of Dr. Carlson referred to were thereupon received in evidence and marked Defendant's Exhibit A.)

The Witness: I would like to have them returned.

Mr. Freeman: When the case is over you will get them.

The Court: I assume counsel is willing to return them as soon as copies are substituted.

Mr. Freeman: We are planning on subpoenaing the hospital records.

Mr. Brobst: We will make the same stipulation. I will see that they get back to the doctor.

The Court: Very well, you are excused, Doctor.

JAMES E. EVERETT

recalled as a witness on behalf of the plaintiff, previously sworn.

Cross Examination (Resumed)

Mr. Freeman: Q. I believe we just started our cross examination, did we not, Mr. Everett?

A. Yes. [44]

Q. You were up on the running board, or in that general area, fixing the indicator? A. Yes.

Q. What kind of a day was this? A. Clear.

Q. Sun shining? A. Yes.

Q. The weather was dry? A. Yes.

Q. There was nothing in the line of atmospheric conditions that had anything to do with your fall or your visibility? A. No.

Q. Which route did you take to go up and fix the indicators?

A. I went up the front of the cab, through the storm window and walked along the running board.

Q. After you did your work there, you started to descend? A. Yes.

Q. Did you look at what you were taking hold of? A. Yes.

Q. Did you see anything wrong there?

A. No.

Q. How long have you been a railroad man?

A. About six years and eight months.

Q. Working around engines all the time?

A. Yes. [45]

Q. Your eyes are all right? A. Yes.

Q. And your sense of touch is all right?

(Testimony of James E. Everett.)

A. Yes.

Q. Was there anything that gave way that led you to believe that there was anything wrong with this particular— A. No.

Q. No one saw you fall?

A. Not that I know of.

Q. Were you not knocked unconscious?

A. Not unconscious.

Q. You told me yesterday in your deposition, Mr. Everett, that the first part of your body that struck the ground was your coccyx. A. Yes.

Q. Did you ever tell anybody else a different story than that? A. Not that I know of.

Q. Were you in your right mind when you went into the General Hospital here in San Francisco?

A. What do you mean by "right mind"?

Q. I mean, was there any reason you should tell anything that was not the truth at that time?

A. No.

Q. Did you know what you were doing and what you were saying?

A. I don't know; I had a hypo and they gave me those pills I [46] was taking.

Q. The hypo was in your coccyx?

A. No, in the arm.

Q. Was there anything you know of that would bring about a story that was different than what you told the jury? A. No, not that I know of.

Q. I am assuming, even though you might have had some medication, there was nothing you know

(Testimony of James E. Everett.)

of that would inspire you to tell any other story than the truth? A. No.

Q. To be sure that our dates are correct now, the accident happened on July 14 of last year?

A. Yes.

Q. You were treated at the hospital here in San Francisco? A. Yes.

Q. You are a member of the Employees Benefit Association, are you? A. Yes.

Q. And you paid up your dues for treatment for just such a thing as this? A. Yes.

Q. Or you would be treated for the same accident at home? A. Yes.

Q. Isn't it a fact that those doctors gave you a return-to-duty slip on August 18 of last year? [47]

A. Yes.

Q. You didn't go back, did you? A. No.

Q. The first time you actually went back to work was February 6 or 9 of this year? A. Yes.

Q. What did you do in the meantime?

A. Nothing.

Q. Where did you say?

A. At home in Santa Barbara.

Q. What did you do there? A. Nothing.

Q. Were you in pain all the time? A. Yes.

Q. What kind of lifting or anything could you do? A. None.

Q. What kind of activity could you indulge in?

A. I would walk eight or ten blocks a day.

Q. In other words, you were in continual pain? How about bending around and so on, did that pain you? A. Yes, it bothered me.

(Testimony of James E. Everett.)

Q. You had commenced your lawsuit at that time, hadn't you? A. At what time?

Q. When you went back home, or when you were back at home in Santa Barbara after the first discharge and first return-to-duty slip?[48]

A. No, in October.

Q. Part of the time, then, you had a lawsuit in operation. From October on you were in the process of litigation. A. Yes.

Q. Did you suffer any cuts in this particular fall? A. No.

Q. Did you suffer any broken bones that anybody has ever told you about? A. Yes.

Q. Who?

A. The X-rays made at Santa Barbara and the doctor told me I had a broken coccyx.

Q. Were those reports sent to the General Hospital along with the rest your your care? A. No.

Q. Which doctor was that?

A. I cannot think of his name now. He has an office on State Street right in the middle of Santa Barbara.

Q. Was he a doctor of your Benefit Association?

A. No.

Q. He was somebody else? A. Yes.

Mr. Freeman: Do you have that report, Mr. Brobst?

Mr. Brobst: Q. Was that a doctor down in Santa Barbara? [49] A. Yes.

Mr. Brobst: I don't have that report, I am sorry.

The Witness: I had this done on my own. I paid for the X-rays.

(Testimony of James E. Everett.)

Mr. Freeman: Q. Did you bring the X-rays with you? A. No.

Q. How many return-to-duty slips have you actually been given? A. Two.

Q. You actually went back to work for four hours? A. Yes.

Q. You were the one that made the complaint of pain after you went back to work? A. Yes.

Q. No one told you you were in pain other than yourself? A. No.

Q. It was your idea, then, to stop work?

A. Yes.

Q. As a matter of fact, Mr. Everett, you have been doing a good deal of drinking in Santa Barbara, haven't you?

Mr. Brobst: I object to that as immaterial.

Mr. Freeman: It is not immaterial. If this man is really trying to get well and is really spending his time drinking, that is very material.

Mr. Brobst: I assign those remarks as prejudicial. [50]

The Court: I don't think that has any place in this case.

Mr. Freeman: I don't want to make an offer of proof in the presence of the jury, but we are perfectly prepared to connect this up. In other words, as I said before, and I said in my opening statement I want to show that there are factors other than the injury that are entering into Mr. Everett's conduct and his condition and this is very material for the jury to find out.

(Testimony of James E. Everett.)

Mr. Brobst: If they have another fall, they can show, I have no objection, but I don't think this is material.

The Court: If there can be a connection shown between his present condition and these activities, it could be material. However, if it cannot be connected up, it is not only immaterial, it is prejudicial. I will adopt counsel's statement as given to the Court in the utmost good faith, and I will overrule the objection.

Mr. Freeman: Q. Have you been drinking to excess during the time, say, from the time you first left the hospital on August 18 until you returned in December? A. No.

Q. How about the month of November?

A. November? No.

Q. And in particular the 11th, 12th and 13th.

A. I don't remember those dates.

Q. Would you say that your testimony would be any different, [51] that you hadn't been drinking to excess at that time?

A. Would you ask that again, please?

Mr. Freeman: Will you read the question, please, Mr. Reporter?

(Record read.)

The Witness: I haven't.

Mr. Freeman: Q. Have you ever suspended from your employment for drinking?

Mr. Brobst: I object to that as immaterial. Something that happened in the past certainly wouldn't have anything to do with this.

(Testimony of James E. Everett.)

The Court: Sustained.

Mr. Freeman: I have no further questions at this time, your Honor. Pardon me, just one more thing:

Q. Did you have any falls of any kind in this particular period of time? A. No.

Mr. Freeman: That's all.

Redirect Examination

Mr. Brobst: Q. Mr. Everett, you are a married man, are you? A. Yes.

Q. And you have one small child? A. Yes.

Mr. Freeman: That is immaterial. [52]

The Court: Sustained.

Mr. Brobst: No further questions at this time.

The Court: That will be all. You may step down.

Mr. Brobst: I must confess that we are entirely out of witnesses. My other doctor is not due until 2:00 o'clock.

Mr. Freeman: In anticipation that this might happen, that Mr. Brobst might run out of witnesses, I have tried by phone to see if we can get our doctor over at 3:00 o'clock rather than putting him on tomorrow morning. If Mr. Brobst is caught in an embarrassing position, perhaps our doctor can go on; and I also plan on subpoenaing the hospital records.

Mr. Brobst: My doctor should be here at 2:00 o'clock. He is testifying in another case and told me just as soon as he got through he would be here.

The Court: Your suggestion, then, is that we recess until 2:00 o'clock?

Mr. Brobst: Yes, your Honor.

The Court: Very well. The Court will recess until 2:00 o'clock.

(Thereupon an adjournment was taken until 2:00 o'clock p.m. of the same day.) [53]

Afternoon Session, Wednesday, April 7, 1948,
3:20 p.m.

DR. WILLIAM F. HOLCOMB

called as a witness in behalf of the defendant (out of order), sworn.

Mr. Freeman: Your Honor, I want to offer my and Dr. Holcomb's apologies. I just alerted him this morning, stating he would be ready tomorrow morning, but in the course of the day I told him to get over here at this time.

The Court: It is unfortunate that we had this delay, but sometimes it is unavoidable.

Mr. Freeman: The plaintiff's case is not concluded, your Honor, and I understand under the circumstances it is satisfactory for me to go on out of order.

The Court: Under the circumstances, yes.

Direct Examination

Mr. Freeman: Q. What is your name, please?

A. William F. Holcomb.

Q. You are a duly licensed and practicing physician and surgeon in the State of California?

A. Yes, sir.

(Testimony of Dr. William F. Holcomb.)

Mr. Brobst: I will stipulate the doctor's qualifications. I have examined him a good many times.

Mr. Freeman: It is very nice, but the jury, of course, have never seen Dr. Holcomb before and they might be interested. [54]

Q. Have you also had cases for Mr. Brobst before, Doctor?

A. Yes; I have been in court for, and I think against him.

Q. For and against his office. Will you state to the jury your general qualifications and experience in medicine?

A. Well, I graduated from the University of California Medical School in San Francisco and finished my internship at the University of California Hospital in 1923. I then went to New York for postgraduate work and was licensed to practice medicine first in New York in 1923, was resident surgeon at the Hospital for Ruptured and Crippled, which is a bone surgery hospital in New York.

I returned to Oakland in 1924 to practice bone surgery in Oakland since 1924, with the exception of four years I was in the Navy.

Q. In what field did you practice in the Navy?

A. Well, I went to Pearl Harbor immediately after the disaster at Pearl Harbor and was there in the Pearl Harbor Hospital as an orthopedic surgeon for 22 months, and then returned to the Naval Hospital in Oakland where I was the head of the Orthopedic Staff for seven months and for a short time acted as the chief of surgery in that hospital.

(Testimony of Dr. William F. Holcomb.)

Then I did general work as a medical officer on the United States Cruiser **Montpelier**.

Mr. Freeman: Can you hear the doctor all right?

Jurors: Yes. [55]

Mr. Freeman: Q. Doctor, in response to my request, did you examine the plaintiff here, Mr. Everett, yesterday?

A. Yes, sir, I saw him about 5:30 last night.

Q. And did you have X-rays taken?

A. Yes, sir, I did.

Q. And did you make a physical examination of him? A. Yes, sir.

Q. How will you tell the jury just what you found in relation to Mr. Everett, particularly in relation to his coccyx?

A. Well, first of all, a history was taken by the nurse and was verified by me. It was taken before I got there. He was hurt, as I remember, in July, in Santa Barbara.

Q. July 14, it is.

A. (Continuing): —where he fell and was injured. According to the statement we received, he was struck on his tailbone—sat down on his tailbone and has had his principal troubles in the area of his tailbone and down the lateral sides of his legs and in back of his legs.

Q. Is this what he told you? A. Yes, sir.

Q. Go ahead, Doctor.

A. He had various treatments in Santa Barbara and has also been treated in San Francisco. His

(Testimony of Dr. William F. Holcomb.)

treatments consisted of medication for pain. He has had injections of novocaine and other medications about the coccyx for pain, and a lot of rest [56] and local applications of heat.

According to his statement, he still had the same discomfort, or largely the same discomfort that he had earlier in the course of the illness.

Q. What did you discover, Doctor, in your examination?

A. Well, he was examined generally. His head, as far as I could make out—a general examination was made. He said he had some nervous headaches at the time when he had pain, he felt, from being tired. As far as one could see, the head was negative. I could find no abnormality about the head.

His chest was normal.

His principal area of discomfort was directly over the tailbone. When pressure was made upon it, he complained of tenderness. A rectal examination was done, as always in examinations of the tailbone, in which the coccyx, the tailbone, can be grasped between the thumb and finger. He complained of pain. There was no pain extending laterally from the tailbone, as far as one could make out by rectal examination.

Q. What do you mean by that? That other than the tailbone, itself, you could find no other area of tenderness, I gather?

A. I mean this: This man complained of pain down the back of his thighs. Sometimes you get pain over the back of the thighs and over the tail-

(Testimony of Dr. William F. Holcomb.)

bone, and when you do it is found usually in the tips of the muscles which extend from the base of the coccyx to the hip and crosses over a nerve. When you [57] examine the tailbone you feel laterally in the rectum and you can feel what is known as the piriformis muscle, which extends laterally from the notch of the ileum, which would give him pain down his thighs. He didn't have pain in that area—tenderness in that area. His tenderness was localized directly on the tailbone.

Next you grasp the tailbone and move it backward and forward so as to test the ligamentous structure and support about it, and so far as I could make out his ligamentous support, as far as I could see yesterday, was good. There was no excess relaxation of the coccyx from the joint between the tailbone and the base of the sacrum. There normally is a little spring that you can feel between the joints, and he has that same type of spring. So far as I could make out his symptoms were all subjective in nature and there were no objective findings either from physical examination or by means of X-ray.

Q. Doctor, by subjective you mean other than his own complaints? A. Yes.

Q. As a medical man, Doctor, if he hadn't told you of any complaint at all, that is, any pain, would you have been able to discover any reason to find anything wrong with his coccyx? A. No, sir.

Q. In other words, the pain you have been telling us about is what he told you? [58] A. Yes, sir.

(Testimony of Dr. William F. Holcomb.)

Q. Did you discover any medical signs that would indicate that there was pain, other than his own complaints? A. No, sir.

Q. Doctor, there has been some testimony by a previous doctor here that it is possible that an operation would be necessary to remove the coccyx. Have you ever performed such an operation?

A. Yes, I have.

Q. Did you discover anything unusual about the bony structure of his coccyx?

A. Well, he has a deviation in his coccyx to— which side it was, I forget whether right or left. You can see a little curve in it in the X-ray picture, but of all the bones of the body that are irregular I think the coccyx is the most irregular. It can have any place from one segment to four segments in it, and it may have joints that are irregular in character and irregular in curvature. So it is irregular and deviates to one side, but as far as I could see it is not due to trauma, it is a developmental phenomenon.

Q. By “not due to trauma” you mean not due to injury? A. Yes.

Q. To what do you attribute the deviation of the coccyx?

A. That is a developmental deviation, like other bones not being regular. We normally think of our fingers as straight, [59] but if you look at them you will see they are not straight. The irregular in the human being is the rule, not the exception.

(Testimony of Dr. William F. Holcomb.)

Q. Do you see any reason to remove this man's coccyx?

A. I do not, except for his constant complaints of pain.

Q. Assuming it was necessary, Doctor, would you tell the jury just what that would mean as an operation in the form of disability, and what would be necessary to be done?

A. Well, all the removals of coccyges that I have done are due to ligamentos—is there a board here?

Q. Yes.

A. (Drawing diagram on blackboard): If you represent the sacrum by a triangular bone, which it is, the sacrum is—

Q. Would you draw it a little heavier, Doctor? It doesn't show very well.

A. The sacrum is a triangular-shaped bone on which the spine rests itself and it has a number of segments, five segments in all, and the sacral foramen between the segments and at the base of this sacrum the tailbone comes down in that triangular area. I can't tell you how many segments this man has, but let's look (referring to X-ray film). Well, I would say that it is three segments, although the joints between them can only be seen as two.

This is the base of the sacrum, and then it deviates off to the right side, so that he has an irregular-shaped coccyx that comes off somewhat to the right. [60]

And there is another segment below that, al-

(Testimony of Dr. William F. Holcomb.)

though I believe this latter segment represents the two.

Now, the area between the sacrum and the coccyx is called the sacrococcygeal junction. If you have a look at this sacrum from the side, this irregular bone and the tailbone, it is possibly a little better view.

Mr. Freeman: Doctor, you just used this picture. May I have that marked?

(The X-ray film was marked Defendant's Exhibit B in evidence.)

The Witness: In this film I think you can see a little closer. It looks as though there are two little bones here, although I think there is a joint in there that represents three; also one of the irregularities of the tailbone.

Now, if you take a look at the coccyx from the side, here you see it extending down from the base of the sacrum in a straight line, possibly slightly curved towards the front, and here is the lower segment (indicating on X-ray film).

Now, in the operating procedure which you asked about, there is a heavy covering of gristle or periosteum, let us say, over the coccyx, and around it, to which the various muscles attach that I have indicated, and the coccyx itself serves the—the only purpose that it serves is to act as the support to what is known as the pelvic diaphragm or the muscular structures that are across the pelvis that enclose the anus and [61] the male—the base of the genital organs in both the male and female.

(Testimony of Dr. William F. Holcomb.)

Now, when you remove the coccyx, the operative procedure is to make a linear cut the length of the coccyx in that fashion (illustrating), and then by means of a sharp instrument the ligamentous structure is peeled away from the coccyx, the coccyx is removed, and then this is sewn together so that your ligamentous structures come onto the base of the sacrum rather than to the coccyx, and you use this bone in this area instead of the bone in this area to support the heavy ligamentous structure of the pelvic diaphragm.

Q. In other words, you just remove the coccyx bone and attach the ligaments to another bone?

A. Remove the coccyx and reattach the ligaments to the base of the sacrum and sew it together.

I was going to say the only coccyx I have ever removed is where the ligaments about the coccyx have been ruptured, you have to remove the coccyx and repair the ligaments. You take a person who falls downstairs and breaks his coccyx, it is practically always forward. Then you go in and remove the coccyx and repair the ligaments and sew them together.

Q. But you didn't find that?

A. It is usually done, and that is the only time it is ever done is when the ligaments are torn in the back or at the sacrococcygeal junction, but I didn't see that in this case. [62]

Q. And you see no reason for an operation?

(Testimony of Dr. William F. Holcomb.)

A. No; I have never removed any for subjective findings alone.

These are taken of the whole lower part of the spine and coccyx (referring to X-ray films). This is to show the lower vertebral column and the areas between the vertebral body.

Mr. Freeman: May I mark those in evidence, your Honor?

The Court: Very well.

(The X-ray films referred to were marked Defendant's Exhibits C, D, and E, respectively, in evidence.)

Mr. Freeman: Q. Doctor, Mr. Everett, as you know, is a railroad fireman. Did you in your examination see any reason why Mr. Everett shouldn't return to work?

A. No, from a clinical standpoint, from the way he looks, he looks strong, looks all right. He says he can't return to work because in riding in the soft seats of a train it jars him up from the vibration. He can't, he says, but from a clinical standpoint we can see no reason why that should be true.

Q. Disregarding what he tells you, can you find anything medically that would justify you in saying he should not return to work?

A. No, sir.

Mr. Freeman: That is all. You may cross-examine. [63]

(Testimony of Dr. William F. Holcomb.)

Cross Examination

Mr. Brobst: Q. Doctor, you did find tenderness on pressure over the coccyx? A. Yes.

Q. And you also found pain on pressure at the tip of the coccyx, is that correct?

A. He said it was very tender.

Q. Isn't it a fact, Doctor, that when you have a coccyx injury they are very slow to respond to treatment?

A. They sometimes are, Mr. Brobst, which is why sometimes surgery is necessary to cure it.

Q. And if he does have pain around it and you find tenderness in the bone, what treatment, if any, can he take to relieve that?

A. Well, he has had the standard treatment, he has had injections of medication to stop the pain, and those do usually stop the pain, not only temporarily but permanently. Either eupercin, which he said he took, or novocaine. I suppose if he continues to complain of that area, some day somebody will take off the coccyx. It is not a major procedure. It could be done if the doctor felt it was indicated.

Q. Isn't it true, Doctor, that you, as a medical man, can differ in your opinion as to what is wrong in there and as to the type of procedure to cure it?

A. There are differences of opinion medically, yes, sir. [64]

Q. And if he has the pain there—he has had it now, I think the records shows, about nine

(Testimony of Dr. William F. Holcomb.)

months—that is a little longer than normal for pain to persist?

A. Normally twelve weeks is the outside limit of an injury of that kind.

Q. And did you get the history from him that he has been back to the Southern Pacific Hospital on three occasions? A. I believe so, yes.

Q. And on those occasions they treated him with novocaine and this other drug that you mentioned? A. Yes, sir.

Q. Now, after those standard treatments fail what comes next, Doctor?

A. Well, I suppose the question of the removal of his coccyx comes next, although that has been discussed. I suppose—he says—what he told me, I don't suppose, is of any interest.

Q. He gave you no reason to disbelieve that he didn't have pain when you applied pressure?

A. No, he hurt from his tailbone when I pressed on it.

Q. And it is just like everything else, if I told you I had a headache, you would have to take my word for it, and just because it is subjective is no reason to say you disbelieved it, is it?

A. Well, the only question in my mind, Mr. Brobst, is that usually when people have a pain in the coccyx, my experience has been [65] that some of the ligamentous structures about it have been ruptured. Now, I think there have been probably histories of painful coccyx—coccydynia, as they call it, pain in the coccyx, without objective findings, but I don't know of any.

(Testimony of Dr. William F. Holcomb.)

Q. The hospital records are not in evidence, but I know they do say he has a coccyodinia.

A. That is the tenderness—that means pain in the coccyx.

Q. And that he had muscle spasms and pain down the legs and thighs?

Mr. Freeman: That is in the hospital records—

Mr. Brobst: That is shown in the hospital records; I am not misquoting it, I know.

Q. There was that early history?

A. Yes, sir.

Q. Does that help you any in determining—

A. No, I can't understand why it has lasted all this time, because usually they get well.

Q. Did he give you a history that he attempted to go back to work in February of this year?

A. I think he did. Just a minute, I will check. He said he was in the Southern Pacific Hospital from January 15 until the 2nd of February of this year and has had no treatment since that time. I haven't any record that he went back to work, no.

Q. Well, the evidence shows he went back to work in February [66] and worked for four hours and the pain was so bad that he had to secure relief. Don't you think, Doctor, under the circumstances, that this has lasted a little bit too long to be let go without some more constructive or aggressive treatment?

A. Well, I am not his doctor, of course, Mr. Brobst, and I was merely asked to give an opinion as to what I can find, and say so. My findings are

(Testimony of Dr. William F. Holcomb.)

that very often lawsuits, litigations, keep symptoms up long after they are normally gone, and that, I think, must be taken into consideration. I think the average doctor does take that into consideration and does not do things that he cannot justify in his own mind, and I think probably that is why the doctors haven't done it.

Q. What I am trying to find out is what the cause of his pain is and why he can't go back to work, if you can help me.

A. Well, I would suspect that after this action is over he will go back to work. That will be my guess as to the cause of his illness and pain.

Q. He has tried it and he gets that pain, and coccyx pain is painful, isn't it?

A. That is what I understand. I have seen a good many—I have only taken out one coccyx in a man in my experience of 25 years. I have taken out a good many in women. Women seem to have more trouble than men do. I don't know whether they ball down more, or what, but it seems to be that women [67] have more trouble than men.

Mr. Brobst: That is all.

Redirect Examination

Mr. Freeman: Q. Just one question that I forgot to ask the doctor. Assume, for example, it were necessary to take out the coccyx, which you just fully explained your ideas about, but assuming you did do it, how long would he be disabled?

A. Well, in the normal case it takes a ligamentous structure to heal about three and a half

(Testimony of Dr. William F. Holcomb.)

weeks. The various ligaments in our bodies heal fairly well in three and a half weeks—they are not completely healed, but sufficiently strong that he is able to get around in three and a half weeks. Following that he would have another period of two and a half to three and a half weeks. Six to eight weeks is the total that should relieve him of any trouble with his coccyx.

Mr. Freeman: Thank you, Doctor.

Recross Examination

Mr. Brobst: Q. Doctor, aren't the results of coccyx operations somewhat uncertain because of the heavy ligamentous attachments down there?

A. No, I don't think they are, Mr. Brobst, if they are properly done and the ligaments are reattached properly—that is, if they are up well; but you must attach them to the base of the sacrum, otherwise you lose the support of what is [68] known as the pelvic diaphragm.

Q. Those are heavy muscles that are attached there, are there, are they not, that go over the hips?

A. Part of them, yes.

Mr. Brobst: I have no further questions.

Mr. Freeman: Thank you, Doctor.

The Court: Very well.

Mr. Freeman: Your Honor, I subpoenaed the hospital records and they were brought here, and I believe it can be stipulated by Mr. Brobst and myself that they can be introduced in their en-

tirety in evidence. They are the records of the San Francisco Southern Pacific General Hospital, records of Mr. Everett's treatment for the period of time in this case.

Mr. Brobst: Yes, they may be admitted, and either side may read from them as they so choose.

The Court: Pursuant to stipulation they may be received.

(The documents referred to were marked Defendant's Exhibit F in evidence.)

Mr. Freeman: That is my witness, your Honor. I plan to have another one tomorrow, and that is as far as I can go at this time.

Mr. Brobst: Your Honor, I will make this statement: That if my doctor puts in no appearance at ten o'clock tomorrow I will rest without him, because I think it is an imposition to wait any longer. [69]

The Court: Very well. Adjourn until tomorrow morning.

(An adjournment was thereupon taken until tomorrow, Thursday, April 8, 1948, at ten o'clock a.m.)

Thursday, April 8, 1948, 10:30 o'clock a.m.

The Clerk: Everett v. Southern Pacific.

Mr. Brobst: Ready.

Mr. Freeman: Ready, your Honor.

The Court: You can stipulate now the jurors are all present.

Mr. Brobst: Yes.

Mr. Freeman: Yes.

The Court: You may proceed.

Mr. Brobst: Your Honor, at this time I would like to read into the record certain portions of the hospital record.

Mr. Freeman: Are you just going to read portions of them, Mr. Brobst?

Mr. Brobst: Yes. I think I will read most of it probably. Some of this is rather difficult.

Mr. Freeman: Would you give the dates and the particular examinations you are using?

Mr. Brobst: Yes, as near as I can make these out.

This is a progress record. They may not be exactly in order. I can't follow the order that they put these things in here.

This is under date of 7/19/47. "Injury 7/14/47. Locally painful, S. Left." That probably mean sacroiliac left—or sacrum left—"radiating left and right to knee. Tenderspines [71] region. Bending—forward"—something—"good. Back — painful limited, otherwise good. Reflexes diminished left and Achilles ankle. Sensory—diminished, lateral aspect left lower leg. Injected 10 C.C. 2 per cent novocaine to coccyx. Some immediate relief from coccydynia."

This is 7/18/47, which is an X-ray report. "There is deviation of coccyx to the right. The spacing between the bodies of the lumbar spine is normal; the spinous processes are normal; there is no definite pathology in the lumbar spine; no evidences of fracture can be determined."

This bears date of 7—that evidently is the date of the injury.

Mr. Freeman: 7/14/47 is the date of the injury.

Mr. Brobst: This is on a yellow sheet. 7/18/47 is the date of this. "Patient states that on duty last Monday 7/14/47 about 10:35 a.m. at Santa Barbara, California yards, while he was in front of the engine No. 1823 the hand rail came loose and he lost his balance, and fell on the ground from about 8 feet landing on his feet and backwards. Plaintiff states that immediately after his accident he felt a sharp pain in the lower back, pain runs down to back of both thighs and legs. Plaintiff was taken by ambulance to St. Francis Hospital at Santa Barbara where X-rays were taken and then he was transferred to this hospital. At present time patient still complaining of pain in the lower back with radiations to back of [71] both thighs and legs. Pain not increased with coughing. No injuries or accidents before. No serious diseases before. Operations: Tonsillectomy, appendectomy."

Here is the examination: "Lumbar and sacral spine is very tender in the middle line to palpation. The muscles of these regions are spastic with movements. Extremities: Abduction, adduction, and flexion of the thighs upon the pelvis are limited due to the pain of lower back, the pain is more severe with the movements of left inferior member. The touch sensation and prick with a pin is diminished inside of left leg. Patient feels these sensations diminished compared with same regions on other side."

Here is report dated August 12, 1947, addressed to Dr. Washburn, evidently sent out under Dr. McRae's signature:

“James Elmer Everett, age 34 years, occupation locomotive fireman, Santa Barbara, California. Total service 6 years.

“In reply to Mr. Luhr's request for report: Mr. Everett was admitted to the hospital on July 18, 1947, with the following history:

““The patient states that on July 14, 1947, at about 10:35 a.m. at Santa Barbara, California Yards, while on duty in the front of Engine No. 1823, the hand rails came loose and he lost his balance and fell to the ground, a distance of about eight feet, landing on his feet, and bent backward. Immediately after the accident he felt a sharp pain in the lower back, the [72] pain running down to back of both thighs and legs. He was taken by ambulance to Saint Francis Hospital at Santa Barbara, where X-rays were taken and he was then transferred to this hospital.

““At present he complains of pain in the lower back with radiation to the back of both thighs and legs. The pain does not increase on coughing.”

“Examination on entrance revealed a heavy-set man in apparently acute distress, with diffuse tenderness all over his back; spasm of the back muscles limitation of motion; tenderness over the coccyx with pain on motion. There was no evidence of neurological involvement and X-rays were negative for evidence of fracture.

“X-rays of the coccyx showed deviation to the right from a congenital deformity, without evidence of injury.

“He was treated by rest in bed and physiotherapy with complete relief of pain in his back. His coccyx continued to be painful and he was injected with novocaine, with relief.

“On August 11, 1947, his symptoms had entirely subsided and at his own request he was discharged with return to duty date for August 18, 1947.”

Now, here is one—this was on his return in 1948 in January to the hospital:

“Patient has had pain in region of coccyx since fall in July, 1947. Two admissions to hospital have been unsuccessful. [73] Now in again because of continued pain in coccyx.

“1/20/48—caudal anesthesia with relief — only during period of anesthesia.

“1/27/48—tenderness about coccyx injected with 10 C.C. 2 percent novocaine with relief temporary.

“February 2, 1948—patient up and about ward, etc. with visible evidence of any distress. However, still complains of tenderness over coccyx.” I don’t know what that is. It looks like a three with a line over it.

Mr. Freeman: It had better be transcribed in its entirety.

Mr. Brobst: “However, still complains of tenderness over coccyx. I believe that patient has some distress but not to the degree that he complains of; do not believe removal of the coccyx is

indicated and do believe that he can return to work."

Mr. Freeman: What was that date?

Mr. Brobst: "Discharged February 6, 1948."

I think he went back to work after that.

Here is 12/7/47. I don't know what films those are. It says, "Cane films," I guess, "of coccyx show displacement of last two segments. Question of excision is to be considered."

"12/8/47—Again injected with novocaine surrounding coccyx."

Mr. Freeman: We are going back to December, is that correct? The other one was February and this is December?

Mr. Brobst: Well, the order they are in—yes, this precedes [74] the other one.

"12/2/47, injured July 14, 1947, fell 8 feet off an engine landing on buttocks, was in this hospital one month, then seen by local M.D.'s in Santa Barbara and L. A. Diagnosis coccydynia, present complaint, pain on tip of coccyx while sitting relieved by being up, dull aching both legs from hips down all the time, a tingling," I guess, "not aggravated by coughing. Examination showed tenderness on tip of coccyx on external palpation. Legs equal in diameter."

This says, "Now tender, no hypoesthesias." I don't know what that "tender" means.

Mr. Freeman: Do the best you can. It is pretty hard to read it. I don't know whether that is "now" or "non".

Mr. Brobst: I don't either.

Mr. Freeman: Doctors write like lawyers.

Mr. Brobst: All right. Again, another injection of novocaine.

All right, here is an examination requested by Dr. McRae and I believe it is signed by Dr. Dunn. The date is 12/2/—this is December 1947. “Pain at tip of coccyx, radiates to sacral region and down posterior aspect of legs.” And here is an X-ray reading in December of 1947—12/3/47, “There is a marked deviation of the coccyx to the right, and the first segment appears to be slightly rotated to the right of the mesial line. I am unable to determine any definite signs of [75] fracture.”

Here is one under date of 12/1/47. It shows, “Coccyx painful on pressure.”

Here is a report signed by Dr. McRae the 11th day of December 1947. It says, “Nature and Extent of Injury: Coccydynia, low back pain, pain down back of legs on coccyx on pressure. Another novocaine injection on that date.”

And here is a report signed by Dr. McRae dated February 17, 1948: “In reply to Mr. Luhr’s request for report: Mr. Everett returned to the hospital on several occasions, with the same complaints as previously noted, coccygeal pain.

“X-rays and clinical examination were negative except for tenderness at the tip of the coccyx.

“He was injected with novocaine on several occasions, with temporary relief.

“On February 2, 1948, a note was made in the record by Dr. Flinn, which reads as follows: ‘Patient up and about ward, etc., without visible evi-

(Testimony of Sidney S. Winkler.)

dence of any distress. However, he still complains of tenderness over the coccyx.

“ ‘I believe that patient has some distress, but not to the degree that he complains of. I do not believe removal of the coccyx is indicated, but do believe that he can return to work.’ ” Signed by Dr. Flinn.

I think that is all.

The Court: Now, do I understand the plaintiff rests? [76]

Mr. Brobst: I have no other evidence unless my doctor should get here in such time that I can put him on. Otherwise I will have to do without him. I don't like to inconvenience the Court.

Mr. Freeman: May we continue on the same basis we did yesterday? Perhaps he might want to continue his case. It is perfectly satisfactory to us, if his doctor shows up.

The Court: Very well.

Mr. Freeman: Mr. Winkler, take the stand.

SIDNEY S. WINKLER

called for the defendant, sworn.

Direct Examination

Mr. Freeman: Q. Mr. Winkler, will you keep your voice up so we can all hear you? What is your name, again? A. Sidney S. Winkler.

Q. By whom are you employed?

A. Southern Pacific Company.

Q. How long have you been so employed?

A. Twelve years.

(Testimony of Sidney S. Winkler.)

Q. Are you an investigator for the Southern Pacific Company? A. I am.

Q. Now, in response to a request, did you visit the vicinity of the home of Mr. Everett approximately in the early part of [77] November of 1947?

A. I did.

Q. And who was with you?

A. Mr. Andrews.

Q. Is he also an investigator for the Southern Pacific? A. Yes, sir.

Q. While you were there did you observe Mr. Everett here in and about his house?

A. I did.

Q. And about the neighborhood?

A. We did.

Q. Did you take any moving pictures of him at that time? A. I did.

Q. Have you reviewed those pictures?

A. I have.

Q. Do they accurately portray what you yourself saw with your own eyes on that particular day? A. Yes.

Q. You have them with you? A. Yes.

Q. Do those pictures show him moving around outside the house? A. Yes.

Q. Did you see him making any bending movements? A. Yes, sir.

Q. How far did he bend down? [78]

A. Practically all the way.

Q. Was he lifting anything?

A. At the time he had the baby, a small child,

(Testimony of Sidney S. Winkler.)

and a kiddie car. He would stoop over and pick up the child and replace the child.

Q. About how far away were you at that particular time?

A. Oh, I would say we were seated in a car with this moving picture camera setup at this time about 15 feet away. On this particular instance we were able to get that close due to the fact that Mr. Everett was very much intoxicated.

Q. What made you think that?

A. By his staggering, which the pictures will show, and his actions.

Mr. Brobst: I will object to that as being wholly immaterial, your Honor, unless it shows a fall or something that might aggravate the injury.

The Court: The same line of objection made yesterday; unless there is some connecting up of this, it will certainly be prejudicial.

Mr. Freeman: Your Honor, we are offering this, as I said before, on the same basis, that his movements, bending, lifting and walking are entirely without any evidence of pain. As I said before, an element entering into this particular case is that rather than doing as he said—I have the transcript here—he said he could not do any lifting at all, that he was in [79] continual pain all the time, that he couldn't bend down without pain, and this man has observed him doing all this, and he has pictures of it and there is no evidence of any pain.

The Court: That, of course, is relevant, but the question of intoxication is what this objection is

(Testimony of Sidney S. Winkler.)

to, and I understood you to say yesterday that you would connect it up medically that that has some bearing on the recovery.

Mr. Freeman: No, I said, and I have the transcript here, I said this was material in my mind because of the fact we are showing he is making no effort to go back to work, he is engaging in other activities.

The Court: What bearing has the intoxication?

Mr. Freeman: I don't want to argue the whole facts before the jury, your Honor, but I am willing if you wish—well, I will leave that.

The Court: Very well. The part about the intoxication will go out.

Mr. Freeman: Q. Did you observe him moving and bending and lifting? A. I did.

Q. Were you close enough to observe any expressions on his face? A. Yes, sir.

Q. Did you observe any expressions which you could interpret as pain? [80] A. No.

Q. Do you have those pictures with you?

A. I have.

Mr. Freeman: I would like to offer those and leave out the question of intoxication.

The Court: Is there any cross examination on the foundation?

Mr. Brobst: No. We have never contended he couldn't do these things.

Mr. Freeman: The testimony we have here, Mr. Brobst, says he can't.

The Court: Those will be received in evidence.

(Testimony of Sidney S. Winkler.)

(The moving picture films were received as Defendant's Exhibit G.)

Mr. Freeman: I don't know the mechanics of setting them up here. We have a camera and a projection man here, your Honor. The films are very short. I don't think they will take more than a couple of minutes.

The Court: Put them some place where the jury can see them.

Mr. Brobst: Don't forget this is 220 voltage. Some of these are set up for 110.

Mr. Freeman: Due to projection difficulties, we might not have these pictures. Is there any objection, Mr. Brobst, to this gentleman acting as projection man? [81]

Mr. Brobst: No.

Mr. Freeman: I don't believe he has to be qualified. I mean, I could almost do it myself.

Q. What time of day were these pictures taken?

A. Around 10:30 a.m.

Q. In the morning? A. November 12.

Q. And where?

A. Right in front of his house on that street, same street.

Q. In Santa Barbara?

A. Santa Barbara.

(The projection man, Mr. Norman Butler, set up his equipment and on turning on the electricity a tube was blown out.)

Mr. Brobst: I told you. You can't say I didn't forewarn you. You have to get hold of the custod-

(Testimony of Sidney S. Winkler.)

ian and bring a transformer and reduce it.

Mr. Freeman: Did that ball things up?

Mr. Brobst: I am afraid you did.

Mr. Freeman: Your Honor, in the meantime, when they turn the house lights on again, I have a doctor here from Santa Barbara who treated him.

The Court: The Clerk has left the courtroom in order to discuss the situation with the custodian.

Mr. Freeman: It is recess time. I haven't had an opportunity to talk with the doctor. He just got here this morning. [82] Could I have a short recess during this period of darkness?

The Court: Very well.

(Recess.)

(The following proceedings were had in Judge Goodman's courtroom:)

Mr. Freeman: Your Honor, I have Dr. Stevens here. Will you take the stand, Dr. Stevens, please?

DR. CHARLES S. STEVENS

called for the defendant, sworn.

Direct Examination

Mr. Freeman: Q. Where do you live, Doctor?

A. Santa Barbara.

Q. Doctor, in response to my request, did you come up here for the purpose of **this case?**

A. Yes.

Q. Are you a duly licensed and practicing physician and surgeon in the State of California?

A. Yes, sir.

Q. How many years have you been such, Doctor?
A. 34 years.

(Testimony of Dr. Charles S. Stevens.)

Q. Doctor, I haven't seen you before today, so will you tell me and the jury what your qualifications as a doctor are, where you studied, what degrees you hold, where you practice and all about it.

A. Well, briefly, I graduate at the University of Minnesota—

Q. I will sit over here, Doctor. You talk to me.

A. And Rush Medical, Chicago, and I did post-graduate work in Chicago and New York. My work is limited to general surgery and medicine. A good many things I don't do, like eye, ear, nose and throat, and obstetrics, but my principal work is that of general medicine and surgery. I am on the staff of the hospitals of Santa Barbara.

Q. How many years have you practiced in Santa Barbara, Doctor?

A. 34 years.

Q. Now, as part of your practice there, do you treat Southern Pacific men as members of the Southern Pacific Employees' Benefit Association?

A. Yes, sir.

Q. And you refer them to and from the General Hospital here in San Francisco?

A. Yes, sir.

Q. In connection with that work, Doctor, did you ever see **Mr. James Everett here?**

A. Yes, sir.

Q. Did you make any examination of him, particularly in relation to his coccyx?

A. Yes, sir.

Q. Tell the jury just in your own words what

(Testimony of Dr. Charles S. Stevens.)

you found, what you observed and what your opinion as a medical man is in the [84] case.

A. Mr. Everett came to me after he had been discharged from the General Hospital of San Francisco—

Q. Pardon me, Doctor. Was that about August of last year? A. August of 1947.

Q. That is right.

A. He walked into my office in a normal manner and told me about his being injured, and he said he wasn't quite well yet but he said the doctor at the hospital on his discharge told him to go to work, but some agent in San Francisco told him not to go to work, so he wasn't working at the time he came into my office. And I asked him what was troubling him, and he said something around his tailbone. So he was—I put him on the table and examined him and he got onto the table as any able-bodied person would, with no limitation of motion and no effort to protect himself in any way from painful sensations.

I examined the coccyx digitally. I could find no pain on the coccyx whatsoever, no dislocation or deformity. There was a slight tenderness in the soft tissues about two inches to the left of the coccyx.

He said that he had had some injection treatments at the General Hospital and they relieved him, and he would like to have me give him an injection treatment. Well, I said that I hadn't received any instructions about the case, I didn't

(Testimony of Dr. Charles S. Stevens.)

know what they had been giving him, and that his symptoms were so [85] trifling that I didn't believe he required any attention. But he insisted that the injections made him feel better, so I gave him on this one occasion of less than 2 C.C.'s of a half per cent novocaine.

Q. Doctor, that doesn't mean much to me. What strength is that?

A. Well, it is very weak solution and it is a small amount, and it wasn't given on the coccyx, it was given towards the left buttock. His relief seemed to be instantaneous.

Q. How long does it take that to take effect?

A. Ordinarily it takes about 20 minutes for it to have any effect whatsoever.

He got off the table and walked out of the office in a normal manner.

About five days later he came back to the office and said he hadn't gone to work yet and wanted to know if he should continue the injections. I examined him again at that time and told him that I could find no reason for any further treatment, and I didn't see him again. I did tell him at that time that he was a patient of Dr. Brown's and it wasn't exactly our custom to have him shift from Dr. Brown to me and that if he had further complaint he probably better see Dr. Brown.

I didn't see him again until—it was the night of August 31, he telephoned my house, his wife did, that he had become paralyzed and she thought he

(Testimony of Dr. Charles S. Stevens.)

was dying and that they had taken [86] him to the hospital, and, oh, a very dramatic picture.

I went to the hospital, found that he had been seen by Dr. Brown and that Dr. Brown wasn't able to find anything wrong with him. Dr. Brown offered to—

Mr. Brobst: This would be hearsay, your Honor.

The Court: Yes, what Dr. Brown told you would be hearsay.

Mr. Freeman: Just tell what you saw.

The Court: Q. Did you make an examination of him that evening?

A. I did—I went into his room, sir, and he was sleeping normally and I didn't awaken him.

Q. And do you know how long he stayed at the hospital on that particular visit?

A. He was discharged September 2. Two days later.

Q. Did you see him again, Dr. Stevens?

A. I only saw him those three occasions; two at my office and once at the hospital.

Q. Have you reviewed the files of the hospital before you came up here about the case?

A. Yes, sir.

Q. Conferred with the other doctors about the case? A. Yes, sir.

Q. Is there any change in the picture as a result of those conferences or examinations?

A. All examinations have been negative except for pain complained [87] of by the patient.

(Testimony of Dr. Charles S. Stevens.)

Q. Did you find yourself or did the records show anything in the line of a fracture or destroying of nerve tissue or anything other than subjective complaints, his own complaints about the matter?

A. No, sir. Am I allowed to read the X-ray report?

Mr. Freeman: Q. I think so.

Have you any objection?

A. It is a copy.

Q. Is this from the hospital records?

Mr. Brobst: They have all been read.

Mr. Freeman: This is not the Southern Pacific General Hospital here, this is the Santa Barbara Hospital. Are you a member of the staff of that?

A. Yes.

Q. Was that in connection with the treatment of Mr. Everett that you reviewed that?

A. Yes, sir.

Q. Would you read it, then, please?

A. "X-rays taken on July 14, 1947, of the lumbar and sacral regions, left foot and ankle, latter oblique and stereoscopic shows no evidence of recent fracture or dislocation. Intervertebral spacing is good."

Q. Is this the left foot and ankle—I mean, is there something about that? [88]

A. It applies to the spine. "Left foot and ankle shows no recent injury."

"Second admission: There is nothing to add ex-

(Testimony of Dr. Charles S. Stevens.)

cept that I had him checked by a neurological physician following his admission into the hospital."

Q. A neurological physician is a nerve doctor, in lay language, Doctor?

A. Yes. "Following his admission to the hospital on August 31 and the report to me was negative findings. On April 5, first of this week, he applied to one of our staff there at his office for treatment of a wart on his foot. He made no mention of any back symptoms, walked normally, got up and down from a chair with no evidence of pain."

Q. Does that conclude the records and your impression of the treatment of Mr. Everett? Doctor?

A. Yes, sir.

Mr. Freeman: Thank you.

Cross Examination

Mr. Brobst: Q. You saw Mr. Everett three times, is that correct? A. That is right.

Q. And you observed him moving around. How many examinations did you make of him, physical examinations? A. Two.

Q. Two. On the first examination you found no pain in the [89] coccyx?

A. No, he didn't complain of any pain or tenderness in the coccyx.

Q. Nothing at all in the coccyx?

A. No, sir.

Q. And when was the date that you examined him? A. I have it August 18.

Q. And had you seen him before August the 18th? Was that the first time you saw him?

(Testimony of Dr. Charles S. Stevens.)

A. Yes, sir.

Q. You are positive of that?

A. Well, I think—I have no recollection or no record of seeing or treating him before that.

Q. All right. Then as a result of your examination, he was perfectly able to go back to work as far as you were concerned?

Mr. Freeman: Is that in August?

Mr. Brobst: Yes.

A. Well, it was a controversial thing, and he wasn't my regular patient.

He said he had been told to go back to work and then some agent told him not to go to work, and he didn't feel that he was quite ready to go to work, and we don't try to force a man to go to work. I mean that is up to him.

Q. Well, Doctor, you found nothing wrong with him, and you are a doctor for the Southern Pacific Employees' Benefit Association, I think it is, or Hospital Association, and don't you discharge [90] them as able to go to work when they see you in that capacity?

A. I do if they are my patient. When they are not my patient I refer them to the doctor who is taking care of them.

Q. Well, is it right to say, then, that at the time that you saw him on August 19th there was enough in controversy so that you didn't want to take the responsibility of sending him back to work?

A. I didn't feel it was my business to send him back to work.

(Testimony of Dr. Charles S. Stevens.)

Q. Well, did you give any commitment one way or the other that he was to go back to work, or that he wasn't to go back to work?

A. I think that I stated at that time that I was unable to state the day on which he would go to work. The release slip or release paper calls for a definite day on which he shall return to work, and if I made any commitment at all it was that I was unable to state the exact date on which he would go back to work.

Q. Isn't it a fact that you said that you would be unable to state when he would be able to go back to work?

A. That is probably exactly what I said.

Q. So as a result of your examination and because of a controversy about symptoms, you wrote out that he was unable to go back to work and that you were unable to state when he would be able to go back to work?

A. I was unable to name the date that he would go back to [91] work because he was complaining of these symptoms for which I could find no basis.

Q. Well, let me refresh your recollection. This is the slip that you signed, is it not, Doctor (exhibiting document to witness)?

A. Yes. Yes, I think that is correct. That is dated—

Q. August 19th. A. 19th.

Mr. Brobst: I will offer this in evidence, your Honor, to be marked Plaintiff's next in order.

Mr. Freeman: Let me see, Mr. Brobst.

(Testimony of Dr. Charles S. Stevens.)

(Document handed to Mr. Freeman.)

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 8 in evidence.)

Mr. Brobst: This is a Southern Pacific certificate. It says, "Pacific Lines," and it is dated August 19, 1947. It says, "This is to certify that James Everett, employed as fireman and under my care from August 19th to date, account injury"—

Q. Now, he was under your care?

A. For that one office visit.

Q. "Account injury July 14, 1947," and then it says, "Will be able to report for duty on"—and in your handwriting, "unable to state," and it is signed "Charles S. Stevens," is that correct? [92]

A. That is right. I can't discharge another man's patient or order him back to work.

Q. In other words, after your examination you were unable to state when he would go back to work?

Mr. Freeman: That has been asked and answered five times, your Honor.

The Court: Overruled.

A. I was unable to name the date because he wasn't my patient. I had no history of his treatment. He was Dr. Brown's patient. I sent him to go back to see Dr. Brown.

Mr. Brobst: Q. All right. Although you were down there working for the Southern Pacific Employees Hospital Association?

Mr. Freeman: There is no dispute about that,
Mr. Brobst.

(Testimony of Dr. Charles S. Stevens.)

Mr. Brobst: Well, I can't—Well, all right.

Q. Yet you wouldn't take him as a patient of yours? A. I don't handle all the cases.

Q. Isn't it a fact this also, that either Mr. Everett's wife or himself called you at one time and stated he was in some considerable distress, and requested that you come out to see him?

A. I cannot recall any such conversation. I testified that Mrs. Everett called my residence on August 31.

Q. All right. Isn't it a fact that you told whoever called you that he was Dr. Brown's patient and that you wouldn't come out to see him? [93]

A. I don't think I made any such statement. I probably said that he was Dr. Brown's patient and tried to contact Dr. Brown. I didn't refuse to go and see him.

Q. All right. Then when you did find him on this third occasion at the hospital, he was actually in the hospital at the time you came there, is that correct? A. He was.

Q. And the message you received was that he was paralyzed, or some words to that effect?

A. Yes, his wife sent the message that he was paralyzed and dying.

Q. In other words, she was concerned about it?

A. Well, I suppose so. You could assume that.

Q. And he was actually in the hospital when you got there?

A. He was taken to the hospital by—

Q. I mean he was there when you—

(Testimony of Dr. Charles S. Stevens.)

A. He was in the hospital, yes, sir.

Q. And when was it you made the second examination of Mr. Everett?

A. I think it was about five days later, I think it was August 22—four days later.

Q. What type of examination did you make?

A. Well, I stripped—had him take down his trousers and get onto the table, and examined his buttocks and his coccyx and sensation of his upper thighs, and everything that I thought [94] necessary pertaining to the region in which he said he had been injured.

Q. And at that time you elicited no pain on movement of the coccyx? A. No, sir.

Q. Was it then that you called in a nerve man?

A. Was it then?

Q. Yes, or was it after that?

A. No—yes, it was following his entrance to the hospital on July 31 that he was examined. He was also examined by a nerve man on July 16th before he came to the General Hospital for the first time.

Q. Well, you weren't up there at the General Hospital? A. No.

Q. All I want is what you, yourself, did and what you know about. Now, did you, yourself, call in a nerve man? A. Yes.

Q. In other words, there were sufficient symptoms so that you were concerned about a nerve involvement?

A. I wanted to know whether there was any nerve involvement or not.

(Testimony of Dr. Charles S. Stevens.)

Q. That is right. What is the name of the nerve doctor? A. Dr. Wentz, Arthur Wentz.

Q. You knew that after you had examined him that he had gone back up here to San Francisco, to the Southern Pacific [95] Hospital in San Francisco? Did you find that out? He was up here in December, 1947? A. No, I didn't know.

Q. And did you get a history at that time that the hospital up here found pain in the coccyx on manipulation and gave him several injections of novocaine? A. No.

Q. You didn't know that?

A. Not reported to me.

Q. You didn't know he attempted to go back to work and was unable to work more than four hours? A. No, nothing about it.

Q. You didn't have any of that? A. No.

Mr. Brobst: I think that is all.

Mr. Freeman: That is all. Thank you very much, Doctor.

That is the conclusion of my case, your Honor, unless the film machine is now working. Those films are very short. They are no more than about two minutes long.

The Court: Well, I think we will return then to my courtroom upstairs and look at the pictures.

Mr. Freeman: I can't guarantee a movie, but I will try.

(The following proceedings were had in Judge Lemmon's courtroom:)

(Testimony of Sidney S. Winkler.)

The Court: You may proceed. [96]

Mr. Norman Butler: (Projection operator.)
May we have the film, please? I think Mr. Winkler has it.

(The witness Winkler produces the film.)

Mr. Freeman: Is this the same film?

The Witness Winkler: Yes, sir.

Mr. Brobst: I might ask the camera man one question: I notice that this is a sound machine, is that correct? It shows sound pictures?

A. Sound and silent.

Q. Does it operate at the normal speed, or does it operate fast?

A. It has two adjustments; it is governed by two speeds for silent and sound.

Mr. Brobst: I see.

Mr. Butler: You may notice when it first starts it may start a little fast, and then slow, but that is to remove a fire screen we have here to keep the film from burning.

(Thereupon the moving pictures were shown.)

Mr. Freeman: That concludes the evidence, your Honor.

The Court: Both sides rest?

Mr. Freeman: I do.

The Court: Any rebuttal?

Mr. Brobst: I think I would like to put Mr. Everett back on and ask a few questions.

The Court: We will take a recess until 1:30.

(A recess was taken until 1:30 o'clock p.m.)

Afternoon Session, April 8, 1948, 1:30 o'clock p.m.

JAMES E. EVERETT

the plaintiff, recalled in rebuttal; previously sworn.

Mr. Brobst: Q. First, Mr. Everett, would you tell us what happened at the time you were taken to the hospital back in August, 1947?

A. Well, I was laying out in the front yard with my swimming trunks on, taking a sun bath. It made my back and legs better to be out in the sun. And I was laying on my stomach, and I tried to get up, and it felt like somebody was sticking a knife in my legs, and my legs got numb. And my wife was with the baby down to the beach, and I called the girl next door and she went down and got my wife, and she came back and called the yard office, the railroad yard office, and she told the yardmaster about it, and they called the ambulance and they took me to the St. Francis Hospital.

Q. You went to the St. Francis Hospital by ambulance? A. Yes.

Q. And did Dr. Stevens ever come out, as far as you can recall?

A. I never saw Dr. Stevens.

Q. How long were you there in the hospital?

A. Two days.

Q. That condition then cleared up, did it? [98]

A. It got better; I could walk. I would rub my legs, massage them.

Q. Now, Mr. Everett, as far as taking the baby out in this little Taylor Tot, I guess it is. Do you do that regularly?

(Testimony of James E. Everett.)

A. I do it every day, every morning unless it is raining.

Q. As a matter of fact, in your deposition that was taken the other day—

Mr. Freeman: I think that is entirely incompetent, irrelevant and immaterial. Are you impeaching your own witness?

Mr. Brobst: No.

Mr. Freeman: The witness is right here in the courtroom. You can ask him anything you want, but you can't read the deposition except for impeachment.

Mr. Brobst: Well, your deposition was taken, wasn't it, just the day before this trial?

A. Yes.

Q. And you lifted objects, bent over and lifted objects, but not in excess, I believe you told them—

Mr. Freeman: I object as very leading, your Honor. He is capable of testifying.

The Court: Yes, sustained.

Mr. Brobst: Q. Well, did you lift objects, Mr. Everett? A. Yes.

Q. Approximately how heavy?

A. Oh, 12 or 15 pounds. [99]

Q. And what was the weight of your baby?

A. At that time she was between 14 and 15 pounds.

Q. And I believe that is what you testified to in your deposition? A. Yes.

Mr. Freeman: Mr. Brobst, his Honor has ruled. You are insisting on asking the same question

(Testimony of James E. Everett.)

when you know the Judge has sustained an objection to it.

Mr. Brobst: Have you any objection, Mr. Freeman, to introducing the deposition in evidence?

Mr. Freeman: I don't believe the contents, Mr. Brobst—As I understand the law—I may be wrong on this—if a witness is in the courtroom and present and able to testify, unless he is being impeached, the previous testimony can't be offered.

The Court: That is the only sensible rule, and that is the rule I will adopt.

Mr. Brobst: Q. Well, now, Mr. Everett, you did see Dr. Wentz, did you not? A. Yes.

Q. And who sent you to Dr. Wentz?

A. Dr. Wentz came to the hopsital on the 17th of July, to see me.

Q. That was before you had ever seen Dr. Wentz? A. Yes. [100]

Q. And after you were examined by Dr. Wentz what happened?

A. Well, he said he was afraid I might have a ruptured disc in my back, and he said, "I think we better send you to the Southern Pacific Hospital.

Q. And it was on his recommendation, then, that you were sent on up to the San Francisco General Hospital? A. Yes.

Q. How far can you walk before it bothers you?

A. Oh, ten or twelve blocks, something like that.

Q. Do you get any particular discomfort in bending over without lifting anything?

A. Yes, it bothers me.

(Testimony of James E. Everett.)

Mr. Brobst: I think that is all.

Cross Examination

Mr. Freeman: Q. I believe you testified yesterday about your lifting to the jury here, Mr. Everett, and at that time—today you say you can lift objects of some weight. Do you recall making this—I will show you a transcript of yesterday's testimony.

Mr. Brobst: What line?

Mr. Freeman: 15 and 16.

Mr. Brobst: How about 17?

Mr. Freeman: You can read it. I will give you the transcript, but I want to read just this particular lifting part.

Q. Read lines 15 and 16 (handing transcript to witness). [101]

Mr. Freeman: I want to read lines 15 and 16, your Honor, on page 48 of yesterday's testimony.

The Court: Of this witness?

Mr. Freeman: That is right, of this witness, and I was asking the questions of him:

“What kind of lifting or anything could you do?

“A. None.”

Q. I have just been reading the hospital record, Mr. Everett, when you first were taken into the hospital, as to the description, and obviously you didn't write this, I am sure. I see nothing in here about any bruises, cuts, or bumps of any kind. What, if anything, did you have physically to show there? A. There was no cuts or bruises.

Q. Nothing that showed on the surface?

(Testimony of James E. Everett.)

A. Not that I know of. Nobody said there was. I couldn't see there.

Q. Well, I was just curious myself. Mr. Everett, you have been here in the courtroom now for two days, sitting on chairs. Do you always sit in the same way that you have been sitting here in the courtroom in my presence for two days?

A. Yes, either on one hip or the other, if I can.

Q. Do you squirm any more than you have been in the two days you have been here?

A. You mean moving from one side to the other? If I am sitting on a hard chair I move from side to side. [102]

Q. I don't mean now, but I mean for a day or two before, before the question was asked.

A. Will you say that again?

Q. Is that the way you normally have been sitting, with the same degree of comfort or pain, whichever way you want to describe it, and is it any different than you have been in the past eight or nine months?

A. I don't sit in a hard chair at home.

Q. This is a harder chair than you normally sit in, is that correct?

A. This?

Q. Yes.

A. No, I wouldn't say any harder.

Q. I thought you said you sat on softer chairs at home.

A. No; kitchen chairs are the same as this.

Q. And it doesn't cause you any more discomfort here in the courtroom than it has for the last eight months before?

A. No.

(Testimony of James E. Everett.)

Mr. Freeman: That is all.

Mr. Brobst: May I see the transcript? What page was that?

Mr. Freeman: I was on page 48.

Redirect Examination

Mr. Brobst: Q. Now, Mr. Everett, I think also you do other things around the house besides take the baby out, don't you? [103] A. Yes.

Q. What are those?

A. I hang out the laundry for my wife.

Mr. Brobst: I think that is all.

Mr. Freeman: No further questions.

Mr. Brobst: I guess that is all, your Honor.
We rest.

The Court: Both sides rest?

Mr. Freeman: Yes, your Honor.

(Testimony closed.)

CERTIFICATE OF REPORTER

We, Official Reporters, Certify that the foregoing transcript of 103 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ CLARENCE F. WIGHT,

/s/ F. J. SHERRY.

[Endorsed]: No. 12089. United States Court of Appeals for the Ninth Circuit. James E. Everett, Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 8, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12089

JAMES E. EVERETT,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

DESIGNATION OF RECORD TO BE
PRINTED

Appellant requests that the entire typewritten, certified transcript of record, including all motions, be printed.

STATEMENT OF POINTS

Appellant hereby adopts the statement of points upon which plaintiff intends to rely upon appeal which is specifically set forth in the Designation of Record to be Printed and Statement of Points upon which Plaintiff Intends to Rely Upon Appeal heretofore filed in the above matter in the District Court of the United States, Northern District of California, Southern Division.

Dated November 30, 1948.

HILDEBRAND, BILLS & McLEOD,

By /s/ D. W. BROBST,

Attorneys for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed December 1, 1948. Paul P. O'Brien, Clerk.

